



EDINBURGH,

The seventh of *April*, 1677.

IT is ordered by the Lords of His Majesties most Honourable Privy Council, that none shall Re-print, or Import into this Kingdom, this Book, Entituled, *The Laws and Customs of Scotland, in Matters Criminal*; By Sir George Mackenzie of Rose-haugh, for the space of Nineteen years after the Date hereof, under the pain of Confiscation of the same to Thomas Brown, George Swintown, and James Glen, Printers hereof, and further punishment, as the Council shall think fit to inflict upon them. Extracted be me

Thomas Hay.



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I-10-45
THE
L A W S
AND
CUSTOMES
OF
SCOTLAND,

In Matters

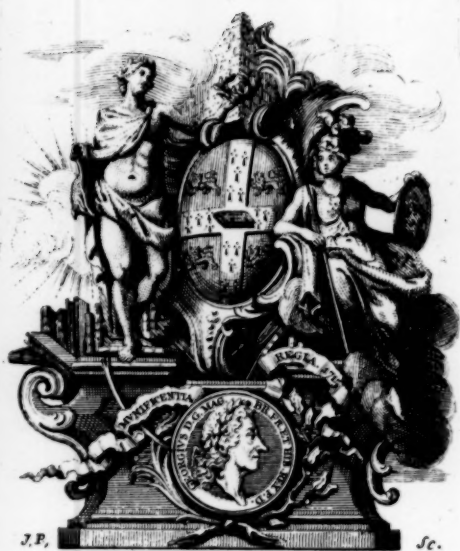
CRIMINAL.

Wherein is to be seen how the Civil Law, and
the Laws and Customs of other Nations
do agree with, and supply ours.

By
Sir **GEORGE MACKENZIE**
of *Rose-haugh*.

E D I N B U R G H,

Printed by *George Swintoun*, one of His MAJESTIE'S
Printers : *Anno Domini* , MDCLXXVIII.



1574:10

TO HIS GRACE
JOHN Duke of LAUDERDALE,
*Marquess of March, Earl of Lauderdale, and
Guildford, Viscount Maitland, Lord Thirle-
stane, Musselburgh, Boltoun, and Petersham:
President of His MAJESTIE'S most Honour-
able Privy Council of SCOTLAND, Sole
Secretary of State for the said Kingdom;
Gentleman of His MAJESTIE'S Bed-Chamber:
and Knight of the most Noble Order of the
Garter.*

May it please Your Grace,



Hough the number, and wit
of such as use to write Dedi-
cations, may seem to have
exhausted all that can be said
upon such occasions: yet I
have a new way of address
left me, which is, to write nothing of you, but
what

The Epistle Dedicatory.

what is true, by the confession of your enemies, who admire more the greatness of your Parts, than of either your Interest, or Success: And how you have made so great a turn in this Kingdom, without either Blood or Forfeiture, shewing neither revenge, as to what is past, nor fear as to what is to come; continuing no longer your unkindness to any man, than you think he continues his opposition to his Prince.

All have at sometime confest, that you have been the Ornament, as well as Defence of your Native Countrey, to whom every Scottish-man is almost as dear, as every man is to his own Relations. And I am sure that your enemies will find it easier to put you from your Office, then to fill it; and none of them can wish you to be removed, without being himself a loser by it. Nor can I be so unjust, even to such as oppos'd you, as not to acknowledge that I have heard them talk of you so advantageously (when design and interest oblidged them to dissemble) as almost convinced me,
that

The Epistle Dedicatory.

that the most of them opposed you only in publick, rather from the glory of having so great an Adversary, than from the justice of the undertaking. And your Countrey has in their late Confluences, (where they crouded in mighty numbers, and with a remarkable joy to meet you, when a privat man) shew'd greater respect to your naked merit, then to the highest Characters by which others were marked out for publick honour.

Having writ this Book to inform my Countrey-men, and to illuminat our Law, I could not present it more justly to any, than to your Grace, who has derived your Blood from a Noble Family, which has been still eminent in our Courts of Justice, since we had any; and who are your self, the greatest States-man in *Europe*, who is a Schollar; and the greatest Schollar, who is a States-man: For to hear you talk of Books, one would think you had bestowed no time in studying men; and yet to observe your wise conduct in affairs, one might
be

The Epistle Dedicatory.

be induced to believe, that you had no time to study Books. You are the chief man who does nobly raise the study of the Civil Law, to a happy usefulness, in the greater and general Affairs of *Europe*, and who spends the one half of the day in studying what is just, and the other half in practising what is so: All which may be easily believed, from me who am as great an instance of your generosity, as an admirer of it. Especially since you have left me nothing to wish, so that what I say, needs not flow from flattery, and so must be presumed to flow from conviction and gratitude in,

*Your Graces most faithful,
and most humble
Servant,*

George Mackenzie.

THE
DESIGN.



He great concerns of men, are their Lives, Fortunes, and Reputation, and these three suffering at once in Crimes, it is the great interest of mankind, to know how to evite such accusations, and how to defend themselves, when accused: And yet none of our Lawyers have been so kind to their Countrey, as to write one Sheet upon this pleasant and advantagious Subject, which made it a task both necessary and difficult to me.

In prosecuting this design, I was forced to revise and abreviat those many and great Volumes which make up our Criminal Registers, and having added to them these Observations I have myself made, during my twenty years attendance upon that Court, either as Judge, or Advocat; I collatio-
a *ned*

The Design.

ned all with our Statutory Law, the Civil Law, and the Customs of other Countreys, and the opinions of the Doctors: And, as I may without vanity say, that few valuable Authors treat of Crimes, whom I have not read; So there is nothing here which is not warranted by Law, or Decisions, or in which, when I doubted, I did not confer seriously with the learnedst Lawyers of this Age; and yet I doubt not but in some things, others may differ from me, as the best Writers do amongst themselves: And having only designed to establish solidly the Principles of the Criminal Law, I wanted room for treating learnedly each particular case, or even for hinting at all such cases as may be necessary; And without wearying my Readers with Citations, (which was very easie) I have furnished the Book with as much reason as is ordinarily to be found in Legal Treatises.

The reason why I have so oft cited the Basilicks, Theophil. and the Greek Scholiasts, was not only because none before me have used them in Criminal Treatises; but because I conclude them the best.

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best Interpreters of Justinians Text: For these Books having been Writ in the same Age, and place, and some of them by those who compiled the Latine Text, they must understand it best of all others, of which I have given many instances in this Book, and shall here adde one, there forgot, which is, that the Latine Interpreters doubt much what is meant by remittendum in the constitution, Si quis Imperatori maledixerit, some interpreting it pardoned, some to be sent back to the Emperour: But the Basilicks render it *οὐκ ἔστιν*, which signifies only ignoscendum.

I cannot but admire much the wisdom of God, who gives not only inclination, but pleasure to such as toyl for the good of others; for I am sure few men would have from any weaker impulse bestowed so much time, and so many thoughts upon an imployment, which without bringing gain, will certainly bring envy and censure: For I find it is the genius of this Age to admire such as make the publick good bend to their designs, and to hate such as design to inform them, as if he were

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more my friend who would set my Family by the ears, than he who instructed my Children and Servants in necessary duties.

There are but too many who endeavour now to make all whom they hate, pass for such as love Arbitrary Government; but as in many passages of my former life, I have preferred my Country's interest to my own, so in this Book I endeavour to oppose Arbitrariness, where it is most dreadful, and that is, in matters Criminal, in which Life and Fortune are equally expos'd; for he who disinterestedly declares his own opinion, before private cases occur, (wherein interest or inclination may byass him) doth in so much preclude himself, and others too (as far as his authority can reach) from the power of being Arbitrary; and let others say what they please, I will stand more in awe of my conscience than of my enemies, and govern my self more by my own reason, than by the giddy multitude. I hope I need not be jealous that our published differences will make any unkind to this Book,

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Book, which is published for their service, and which is now more accurate, than when it at first pleased them in Sheets. I did Print it, not only to correct the many false Copies which were abroad, but to divert me from refining too much upon our publick debates; and I wish the reading it may have the same effect upon others. And that all of us would turn things to their true light, and consider without passion how happy we are, who live under a Prince of our own Religion and Blood, whose clemency is as extraordinary as his restitution, who governs us by our own Laws, and countrey men; and distributes all his own revenue amongst us: That we enjoy by his prudence a profound Peace, whilst others bleed or starve in lasting Wars. That all the Commerce of Europe is gathered in amongst us; that we are free from those sucking Taxes under which they groan; and are but lately rescued from a Rebellion, in which, after we had emptied our Veins and Purses for Religion and Liberty, we became Atheists and Slaves.

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PART I.

P A R T I.

TITLE I.

Of Crymes in general, And by what Law
they are judged in *Scotland*.

- 1 *How Crymes differ from Delicts and Malefices.*
- 2 *In what consists the nature and essence of a Cryme.*
- 3 *By what Lawes Crimes are punish'd in Scotland.*
- 4 *How far dole or design is necessary to the committing Crimes, and
how tendencies and insinuations are punish'd.*
- 5 *Whether Minors can commit Crymes.*
- 6 *Whether such as sleep can commit Crymes.*
- 7 *Whether such as are drunk are punishable for Crymes.*
- 8 *Whether furious persons are punishable.*
- 9 *Whether an university or collective body be punishable.*



OD Almighty having created this Lower
World to be equally an instance of his
power, and of his goodness, did fur-
nish it with great variety of excellent,
and wonderful productions: but lest
these should be defac'd at pleasure by
man, who having ruin'd himself, doth
little value, and is much inclined to ruine
every thing besides, therefore God did
not only imprint upon his soul some

common principles whereby he is led to love order, but
did

did likewise fence the æconomy and government he had placed in the world with rewards and punishments, And it was just, that as these who did vertuously, were to be rewarded, so these who were vicious should be punished, which punishments are the subject-matter of the Criminal Law, and of this Treatise.

I. Transgression, or *peccatum*, is by *Modestinus l. obligamur, ff. de obl. & Act.* made the root of all enormities, and is divided *delicta* into *quasi delicta*, & *crimina*. *Quasi delicta*, are such faults and transgressions as are not so hainous that they deserve to be punished criminally; such as small ryots, *delicta*, are such as deserve a more severe punishment, but yet because they tend not to wrong the Common wealth, and publick security immediately, therefore do not deserve to be punished by any express Law as Crymes. Crymes are these injuries done to the Common wealth which are so immediat and heinous, as that they are punished by express Law. This distinction is used by *Mathens*: but *Farinacius* makes *delictum* the genus, and divides it, in *crimen* & *maleficium*, with us this subtilty is not observed, for the word Crime, comprehends both Crymes, and Delicts. The Summonds raised for accusing in both, are called Criminal Letters, and the Court in which both are judged, the Criminal Court. Neither use we the word *malefice* in any Cryme, but in witch-craft, in which it signifies that prejudice, and damage, which arises from the unlawful means used by Sorcerers.

II. In what consists the nature of a Cryme may be doubted, and *l. 1. Reg. Maj. c. i.* A civil Action is desyned to be that which concerns Lands or Goods; And a Criminal Action that which concerns Life or Limb. But *Skeen* in his observations upon that place, do's confess all that to be a Cryme which concerns the publick good, whether a corporal punishment, or pecuniary must be craved: but this is also too general, especially since the Law divides Crymes in publick and privat Crymes: and therefore I offer these considerations, 1. All transgressions of Law are not Criminal, *v. g.* to make a disposition in defraud of Creditors, is not criminal, though it be prohibited. 2. That is not

not only to be accounted a Cryme which bears expressly to be punishable by corporal punishment, or pecunial mulcts: for in my Lord *Renton's* case against *Hoom*, it was found, that poynding of Oxen in time of labouring was Criminal, though it be not appoynted by the Act whereby it is prohibited, to be punished by a definit punishment. Nor is it exprest to be a Cryme, likewise, single Adultery, is punishable, albeit it be not declared to be a Cryme by any expresse Law with us. 3. That cannot only be thought a Cryme, which is committed against the Law of Nature, for poynding of Oxen is no more such, than making fraudulent dispositions.

III. The true nature then of a Cryme may be comprehended, under these general conclusions, First, that is a Cryme, which is declared such by an expresse Statute, as Murder, Treason; and it were to be wisht, that nothing were a Cryme which is not declared to be so, by a Statute; for this would make Subjects inexcusable, and prevent the arbitrariness of Judges. And I find by the general consent of Criminalists, nothing is to be accounted a Cryme or punisht criminally; but what is forbid by the Law, under an expresse pain or punishment; for they observe, that as there can be no punishment inflicted, but where a *delict* is committed: so there can be no *delict* but where the Law hath appoynted a punishment, *Cabal Cas. 1.* And this is clear, 1. at *si quis S. divus ff. de Religios. & sumpt. fun. l. hares ff. de usufr. leg. Surd. consil. 301.* And yet Lawyers assert that such as disobey, and transgress any prohibiting Law, may be punisht arbitrarily, as contemnors of the Law, sutable to the degree of their contempt, though they cannot be punisht Criminally as guilty of a Cryme, *Cabal ibid.* 2. The transgressing any Municipal Law, which prohibits that which either the Law of God, or the Civil Law, punishes criminally, by corporal punishment, or a pecuniary mulct, is a Cryme, and thus the poynding Oxen, in time of labouring was declared a Cryme in the former decision, because though it was prohibited by an expresse Statute, which did bear no punishment; yet it ought to have been punisht

nish according to the Civil Law, whereby it is declared to be a Cryme. 3. That is a Crime whereby the publick peace is immediately disquieted. Or whereby the Law of Nature is violated; Thus Incests, and Rapes, were accounted Crymes with us, before they were declared to be such by an express Law. And Bestiality, and Sodomy, are Crymes; though yet we have no Statute against them. 4. That is a Crime; which long custome hath punisht, by corporal punishment, or by a pecuniary mulct, in the Justice Court, as single and not manifest Adultery.

From all which, it appears that the Law of God is the first fountain of our Criminal Law; And thus the lybel in single Adultery is only founded upon the Law of God. And in usury we lybel upon the Municipal Law, and the Law of God joyntly. 2. Our Statutes, or Acts of Parliament, are our proper Law; but even these may run in desuetude, so far that they cannot be the foundation of a criminal pursuit, for former transgression, since the people who know not Law, so much by reading the Books of Statutes, as by seeing the daily practice of the Country, should not be ensnar'd by pursuits, upon old buried Laws, which scarce Lawyers study or know. Nor can the people be thought to have contemn'd, what they cannot be presum'd to have known. And our Judicators, by ordaining such ancient Laws to be renewed by proclamations, do confess, that before these proclamations; these Laws were not binding: for else the renewing them had been unnecessary, and if it were otherwise, we have so many penal Statutes now in desuetude, that the Leidges would be certainly ruined by them. And thus Collonel *Borthwick* having pursued the Maltmen Criminally for contraveining the 92. Act. 6. Parliament, *Fa.* 4. The Councel upon a supplication representing their grounds, sisted that pursuit. But desuetude must be universal, ancient, and notorious, else the want of any of these three qualifications, will alter this conclusion. And yet I think that desuetude cannot *in futurum* abrogate a Cryme, and enervate the Law altogether, since the Parliament only, can rescind their own

Lays:

Laws: nor should the people, nay nor our Judges, be made legislators, *consuetudinis usque longavi non vilis est auctoritas verum non usque adeo sui valitura momento ut aut rationem vincat aut legem.* L. 2. C. *quasi long.* Consuet. which should rather hold in Crimes, then in any other subject, because it seems absurd, that it should be lawtul to the people, to loose themselves from the Laws made against themselves; and to gain impunity by frequent repetition of their faults: or to be able to free themselves from punishment, by contemning these Laws by which they are inflicted.

The decisions of our Criminal Court, as of all our other, do bind the same or succeeding Judges, rather out of decency, then necessity; for nothing tyes Judges but Laws, and none can make Laws, but the Parliament, which is very suitable to L. *Nemo C. de sent. & inter.* where *Justinian* doth expressly command *ne ullorum judicum sententia pro jure reputentur.* The reason whereof given in that Law, is *quod non exemplis, sed legibus est judicandum*, and the other reason L. *ult. C. de legibus quia imperator est solus legum conditor.* And if we consider how much circumstances influence particular cases, how Judges may fail where parties are nam'd, and that decisions pass necessarily upon less premeditation then is necessary to Laws; it will be found reasonable, not to trust decisions too much. Likeas our Judges, do make express Acts of *Sederunt*, as we call them, when they resolve to regulat future cases; which were unnecessary if all decisions did of themselves bind. Nor doth the decisions of the very Parliament of *Paris*, bind even the pronouncers themselves for the future, as *Conan* observes, lib. 1. c. 15. And so frail, and fallible a thing, are mens judgements; especially where votes are numbered, and not weigh'd: or where experience may discover the errors, which the sharpest reason could not foresee; that therefore Judges should no more be tyed from altering their decisions, then Philosophers to continue in the errors of their Youth. But yet when the arguments *pro* and *contra* weigh equally, and reason seems puzzled where to encline, the

the authority even of our former decisions, should cast the balance, especially where the same reason then urg'd, was there pressed; and in the interpretation of Laws (of which decisions are the best interpreters) if a whole tract of decisions can be produced, it would infallibly bind, wherein *Craig diag. de jure quo utimur* agrees with *Callistrotus, l. 38. de. leg. in ambiguitatibus qua ex legibus profisciscuntur consuetudinem, aut rerum perpetuo judicatarum auctoritatem vim legis obtinere*. Where these decisions have proceeded upon a debate; by which the reason of Judges is much ripened, and the future inconveniences fully considered: for as *Pomponius* well observes, *l. 2. S. his legibus ff. de origine juris, his legibus latis capit ut naturaliter eventire solet, ut interpretatio desideraret prudentium auctoritate necessariam esse disputationem fori*. And *Durie* in the case of *Hoom of Cowdoun-knowes*, shewes us how the L. of Session thought it not derogatory from their honour, to retreat a sentence after debate, which they had pronounced, when no Advocats were compearing.

We follow the Civil Law in judging Crimes, as is clear by several Acts of Parliament, wherein the Civil Law is called the common Law. And *Robert Leslies* Heirs are by the 69. *Act. Par. 6. Fa. 5.* ordained to be forefaulted for the Crime of Treason, committed by the father according to the Civil Law. And forefaultor in absence was allowed by the Lords of Session, in *Anno 1669.* because that was conform to the Civil Law; and falsehood is ordain'd to be punisht, according to the Civil and Canon Law, *Act 22. Par. 5. Q. M.* And that the Civil Law is our rule, where our own Statutes and customs are silent, or deficient, is clear from our own Lawyers, as *Skeen Annot. ad. l. 1. R. M. c. 7. ver. 2.* And by *Craig l. 1. diag. 2.* As also from our own Historians, *Lestly. l. 1. cap. leg. Scotor. Boet. l. 5. hist: Camer. de Scot. Doctr. l. 2. cap. 4.* And the same is recorded of us, by the Historians, and Lawyers of other Nations, as *Forcat lib. 1. hist. Angl. Petr. dtamitis Geograph. Europ. tit. D. Escoffe and Duck de auth. jur. civ. lib. 2. cap. 10.* and though the Romans had some customs, or forms, peculiar to the genius of their own Nation: Yet their Laws, in
Crimi-

Criminal cases, are of universal use, for Crimes are the same almost every where, as Boet. well observes, *leges Romanas à Justiniano collectas tanta ratione & sermonis venustate esse, ut nulla sit natio tam fera vel ab humanitate abhorrens; qua eas non fuerit admirata.* And K. Ja. 5. was so fond of the Civil Law, as Boet. observes, *lib. 17.* that he made an Act, ordaining, that no man should succeed to a great Estate, in Scotland, who did not understand the Civil Law, and erected two professions of it, one at Saint Andrews, and another at Aberdeen. And when James the 2. did by the 48 act of his 3. Parliament ordain that his Subjects should be governed by no foreign Lawes, he designed not to debar the respect due to the Roman Lawes; but to obviate the vain pretences of the Pope, whose canons and concessions were obtruded upon the people as Laws by the Church men of these times.

The 4th branch of our Criminal Law are the Books of Reg. Maj: which are in *criminalibus* lookt upon as authentick. Thus the Thief must be punished before the receptor, and assylers must be *pares curia*, &c. For which, and many other maxims, there is no warrant besides what is contained in these Books of Reg. Majest: But why should this be doubted, seeing they are cited as such, Act 47. Parl. 6. Ja. 3. where it is said, that wilful and ignorant Assylers shall be punished after the form of the Kings Law, in the first Book of the Majesty, and by the 98. act. 14. p. 1. 3. transgressions of that act are to be punished conform to the Kings Laws, and of *Regiam Majestatem*, likeas by the 54. P. 3. J. 1. a Comittee of Parliament is ordained to meet and examine the Book of the Law, that is to say, *Regiam Majestatem*, and *Quoniam attachiamenta*, which is repeated, 115. Act. 14. P. J. 3. And albeit they contain many things which are not in use with us; yet they have been in use, and this objection would conclude, the Acts of Parliament not to be our Law. It is then my opinion, that K. Ja. the 1. hath brought down some of these collections from England with him. Nor find I these books cited before this time.

It is doubted whether the secret Council can by any Act, or Proclamation, either introduce a crime, which can infer tinsel of life,

life, or escheat; for the Parliament can only dispose upon our lives, and fortunes. And it being the representative of the Nation, every man is in Law, said to have consented, to what the Parliament doth; I find *Craig* to have been of opinion that no Act of Secret Council can infer a Crime, *pag.* 38. Nor can the Council, by their Acts, warrand any to do what would be otherwise a Crime: for *ejus est nolle, cujus est velle*. And none can take away a cryme, but such as can introduce a cryme, and therefore Mr. *Archb: Beath*, being pursued, for killing some men, he alledged, that these men, were bringing Meal from *Ireland*, And that by Act of Council, it was lawful to sink or kill such as contravened the Act. To which his *Majesties* Advocat did reply, that the Acts of Secret Council, could not warrand the killing of a free Leidge, and the committing of murder: which reply was found relevant. But since the Council are to secure the peace, and that many accidents may emerge wherein the publick peace cannot be preserved without this power, it were hard to limit them too much.

IV. Whether *dolus* or a wicked designe, be requisite in all crimes; is largely treated of, by the Doctors, and is most fully debated, in the procel of *Ochiltrie*, *Balmerino*, and the Marquis of *Argyle*. And by the texts, *s placuit iust. defurt. l. 3. ff. De injur. l. pen. ff. ad. Leg. jul. de Adult.* It seems, that the wickedness of the designe, makes only an action criminal, but in my judgement, this inquiry may be resolved, in these conclusions, 1. That seeing man can only offend in what is voluntar to him, it must follow, that the will is the only fountain of wickedness. And consequently, it was at first the designe of Law-givers, only to punish such Acts as were designedly malicious. 2. Because design is a private, and conceal'd act of the mind, which escapes the severest probation. Therefore in some cases, this *dolus* is allowed by Law, to be inferred from conjectures, and presumptions, where the act is such, as of its own nature, may be good or evil, accordingly as it is circumstantiat: as in poyson, the giving whereof may be occasioned by ignorance, mistake, or malice, 3. Some acts are so irregular,

gular, of their own nature, that the Law requires only that the act be proved, without proving the *dole*, or wicked designe, as in Sodomy, Adultery, &c. 4. Some acts, though they be not wicked of their own nature, yet because the design cannot still be proved, therefore the contraveining the Law is equivalent to design, & *dolus presumitur contra versantem in illicito*, as the conversing with a woman after the Church hath forbid the same, and therefore the Doctors divide *dolum in verum, & presumivum*. 5. Where the Law hath expressly required, *dole*, and designe there, it must be expressly libelled and proved, as in the Act 37. Par. 2. K. 1a. 2. where it is statuted, that if any man wilfully receiv rebels, he shall be forefaulted; but albeit *lata culpa*, be equivalent, to *dolus*, in lesser Crimes, yet the Doctors conclude, that where the crime may inter death, or mutilation (losse of life, or limb, as we speak) there the grossest negligence, or *lata culpa*, is not equivalent to *dolus*. *Clar. Quest. 84, Num. 7.* It is likewise much debated, whether an endeavour, to commit a crime, be a crime, albeit the effect follow not. And albeit, it be a rule, in the Civil Law, that *in maleficiis, voluntas spectatur, non exitus*, l. 1. §. *divus ff. ad leg. Corn. de sicar.* yet is generally concluded by the practitioners of all Nations, that *simplex conatus*, or endeavor, is not now punishable by death: *Clar. Quest. 91. Gothofr. §. Conatus.* But for clearing this, according to the principles of reason, I shall form these conclusions, first, That all indeavour, is an offence against the Common-wealth: though nothing follow thereupon: albeit sometimes the punishment be conniv'd at, or mitigated, according to the severall degrees of malice, but that it is in it self criminal, appears from this, that simple designe is punishable in treason, and some other atrocious crimes; because in these, especially in treason, it would be too late, to provide a remedy, when the Crime is committed. 2. In lesse atrocious crimes, the designe is punish'd, if the comitter proceeded to act that which approached nearly to the crime it self, *Si diveritum sit ad actum, maleficio proximum.* But this is not *simplex conatus*, but in effect is a lesser degree of the crime, to which it approaches; as if a thief, have put ladders to the house, which he resolves to rob;

or if he mix poyſon, but the potion be ſpilt upon the ground by an accident: And albeit it be commonly received, that even in theſe caſes, *affectus non eſt puniendus, ſine effectu*, by the ſame puniſhment, with the crime deſigned: yet I would diſtinguiſh in this, betwixt an effect diſappointed, by an interveening accident; and that which is ſtopt, by the repentance of the committer, for, where the deſigne was only diſappointed, I think the ordinar puniſhment, ſhould not be remitted, in caſes *ubi deventum eſt ad actum proximum* εἰ καὶ τὸ σκοπὸν μὴ τυχούσι. *Baſil: de extraord: crim: l. 1.* And therefore the court of *Savoy*, did very juſtly condemn a thief, to be hanged, who had entered the houſe of one *Girard* to ſteal and murder, but was deprehended before the theft was committed *Goth. 5. Conatus nam: 16.* For ſince the puniſhment is only remitted *in conatu*, or indeavor, becauſe of the favourable circumſtance, that nothing followed thereupon; So I think this may be counterballanced by the depravity of the deſigne, in many caſes. As if one ſhould deſign to kill a whole family, or burn a whole town, and ſeing men are puniſht, not meerly for what is done, becauſe that cannot be helped, as lawyers affirm, but becauſe, the committer of a crime, may commit the like; Therefore I conclude that he who deſigned to commit a crime, ſhould be puniſhed as if he had committed it; if he was only letted by accident; becauſe the Commonwealth cannot be otherwiſe ſecure. And therefore it was admired, why in *July. 1670.* Mr. *Stanfields* ſervant, was not puniſht with death for indeavouring to burn her Maſters houſe, albeit ſhe was apprehended before any prejudice was done: But I would here add, as a caution, that great præmeditation, ſhould be proved before *Conatus* be puniſhed capitally; for that ſhowes the confirmed malice of the deſigner, and is æquivalent, as to *him*, to ſucceſſe. 3. In mean crimes, where the effect followed not; upon the deſigne, but was hindered by repentance: I think little or no puniſhment ſhould follow, for, *nihil tam naturale. quam unum quodq; eodem modo diſſolvi, quo colligatum eſt.* The like ſhould alſo hold, where the deſign was taken up in paſſion or without præmeditation, becauſe there the committer, is not for the future, ſo much to be fear'd: but this
sub.

subject will be more fully cleared in the particular subsequent titles; for in some crimes, *Conatus* or endeavour, is more punishable than in others.

Whether what tends to a crime, though it be not arrived at the full guilt requisite, to make it fall expressly under the statute, or Law, by which that crime is punished, to which it approaches : has been oftentimes doubted. As for instance, to misconstrue His Majesties Government, and proceedings; or to deprave His Laws, is expressly declared punishable by death, by the 10. *Act. 10. P. J. 6.* Whether then may not papers, as tending to misconstrue His Majesties proceedings, and Government, or bearing insinuations, which may raise in the people jealousy against the Government be punished by that Law? And that such *insinuations* and *tendencies* are not punishable criminally, may be argued thus. 1. It is the interest of mankind to know expressly what they are to obey, especially where such great certifications are annexed, as in Crimes. 2. The Law having taken under its consideration this guilt, has punished the actual misconstruing, or depraving, but has not declared such insinuations or tendencies punishable, & *in statutis, casus omnis habetur pro omisso*. 1. This would infallibly tend to render all Judges arbitrary, for tendencies, and insinuations, are in effect the product of conjecture: and papers may seem innocent, or criminal, according to the zeal, or humour, as well as malice of the judge. Men being naturally prone to differ in such consequential inferences, and too apt to make constructions in such, according to the favour, or malice, they bear to the person, or cause. Are not some men apt to construe that to tend to their dishonour, which was design'd for their honour, and to think every thing an innovation of Law, or privilege, which checks their inclination and design? Whereas some Judges are so violent in their loyalty, as to imagine the meanest mistakes do tend to an opposition against Authority. And thus zeal, jealousy, malice, or interest, would become Judges, if tendencies and insinuations were allowed to be Crimes. 4. Men are so silly, or may be in such haste, or so confounded; and the best are subject to such mistakes, as that

no man should know when he were innocent. Simplicity might oftentimes become a Crime : and the fear of offending, might occasion offence. And how uncomfortably would the people live, if they knew not how to be innocent ? Whereas on the other part, it may be represented, that there are some Crimes which cannot be determined as to all degrees of guilt. Such as is the misrepresenting the Government, which may be done so cautiously, and in such various, and different wayes, as cannot be specified in any Statute. 2. If the misconstruing the Government be a great guilt, certainly, what tends to it must be punishable to some proportion. 3. It is the interest of the Commonwealth, that all disorders should be punish'd ; and surely it is a great prejudice to the Government, that such insinuations, or tendencies, should escape unpunished. And as in the Civil Law, there are many Actions which have no definit and distant names, but are comprehended under the general names of *actiones in factum*; And that there are *actiones utiles*, arising from the reason of the Statute, as well as *directæ*, which arise from the words of the Law : So in criminals, there are Actions arising from the parity of reason, or at least, which inferring guilt in some degree, are sustain'd with us; *tanquam crimina in suo genere*. 4. The doing what may tend to misconstrue, or raise jealousies, is expressly declared punishable by the 60. Act 6. Par. 2. M. whereby it is declared, that such as *sow evil reports, tending thorow raising such rumors, to stirr the hearts of the people to sedition*. And by the 9. Act 20. Par. 6. It is declared, that by the former Laws, every thing was declared punishable, which *tends to sedition, and disention amongst the people*. And if endeavours be punishable, much more ought tendencies : since tendencies are exprefs deeds. Nor hath the Judge more latitude, nor is he more arbitrary here, then he, and the inquest both are, in judging what is arte and part, for that is determined by no Law : and because it could not be determined, therefore a lybel founded upon arte and part in general, was ordained to be sustained as relevant by our Statutes.

V. What persons may be punished; or are capable to commit Crimes; will be clear by determining what persons are not capable, and whether a minor may be punished for a Crime, is contraverted amongst the Doctors; and for clearing of the difficulty, we must distinguish betwixt such Crimes as are committed by contrivance, & *dolo malo*. And in these a minor is to be punished, if the *dole* can be proved, *l. m. Cod. si adversus dotem*. The sum of which Law is, that *ubi Minor deliquit, per dolum restitutio non procedit, sed ubi per culpam ibi subvenitur ei per restitutionem*. 2. In Crimes against the Law of Nature, such as Murder, A minor, is lyable though not to the ordinar punishment, but in meerly statutory Crimes, such as usury, forestalling of Mercats, &c. He is not at all to be punished; except *ubi malitia supplet aetatem*, which, because it is not presumable, should not therefore be inferred, but from very pregnant, and convincing probation. And seeing arte in all Crimes, seems to require judgement and contrivance; it would appear, that though the Crime it self were punishable in minors: Yet art and part should not, seeing that, in effect, depends upon Acts of the judgement; wherein minors may be mistaken, because of their fragility, and lessage: and thus *John Rat* was not put to the knowledge of an inquest, for being arte, and part, of theft, because he was not the principal committer, but went alongst with his father, and was not past twelve years of age, 1. January 1662. 3. Though a minor be punishable where he is *pubertati proximus*, yet he is to be punished more meekly; and thus the Viscount of *Frendraught*, was put to the knowledge of an Inquest, for being accessory to the away-taking and privat imprisonment of *Gregory*, though this was a statutory Crime. And thus *Midlton*, and *Machan* were put to the knowledge of an Inquest. 26. of August 1612. and the 9. of March, 1671. It was found after a most contentious debate, that two boyes, the youngest whereof was not twelve years of age, should go to the knowledge of an Inquest, for casting down of a house at their fathers command: albeit it was alledged, that this act was not of its own nature criminal, as murder,

murder, or bestiality, but its guilt depended upon circumstances, which minors were not obliged to know, as if the house belonged to their father, of which they were informed, and so were not guilty. There are some Crimes also, wherein minors may be punished, and are reputed majors, *per fictionem juris* (according to the opinion of some Lawyers) such as fornication, adultery, sodomy, & *omnia delicta carnis*; because the guilt there consists in the commission of the fact, and not in a contrivance, and so minors may be equally guilty of these Crimes with majors. Yet I differ from these Doctors in this; for since the committing these Crimes, may be occasioned, by levity, and vacillancy of judgement in minors: and seeing furious persons would not at all be punished for such Crimes, I do think the age is somewhat to be considered, even in these cases; and that minors are not to be as severely punished, as majors; seeing they are not of so solid a judgement as these are. I find, *lib. 3. Reg. Maj. c. 32. §. 15.* And in *annot. 100. vers. 3. c. 41. lib. 2.* that a minor is not obliged to answer for any Crime by which he may lose life or limb. And a case is there cited betwixt His Majesty and the Abbot of Parbroth, *annot. e. 13. v. 12.* And Skeen cites for this *l. pen. C. de autorit. tut. & l. 1. §. occisorum ff. ad s. C. Sillan. & Cap. 2. de delict. puer. extrav.* The reason seems to be, because a minor may (being pursued whilst he is minor) omit some defence competent to him. And since a minor is not obliged to debate *de hereditate paterna*, whilst he is minor; much less should he be obliged to defend in a criminal pursuit, *ubi calore juvenili potest dicere vel tacere quod ei nocere potest.* So that it seems, that albeit a minor may be punished for several Crimes committed by him when he was minor, yet is he not obliged to answer for any till he be major. But yet in the Viscount of Fren draughts case, it was found that a minor was obliged to answer to an indictment even during his minority: But whether a minor confessing will be restored against his confession, is fully debated in the title *confession.*

VI. Such as commit any Crime whilst they sleep, are compared

pared to Infants, *l. si. servus S. si fornicarius ff. ad l. aquiliam*, and therefore they are not punisht, except they be known to have enmity against the person killed; or that fraud be otherwayes presumable: *quocasu*, they may be punisht *extra ordinem*, *Farin. quest. 82.*

VII. Such as are drunk, are sometimes for want of *dole*, and malice, more meekly punisht than others; especially if they were cheated upon designe, into that condition by others. And in this case the Law distinguisheth *inter ebrios*, who are rarely drunk, & *ebriosos*, who are habitually drunk: for these last should be most severely punisht, both for their drunkenness, and for the crimes occasioned by it. But such as make themselves drunk upon design to excuse or lessen thereby the guilt they are to commit, merit no favour, and such as knew they were subject to extravagancy in their drink, merit as little, *Cabal. cas. 297* I have not in our Law found drunkenness to defend in either cases; And it was repelled in the pursuite of murder pursued against the Laird of *Spot* and *Douglas*; for killing *Hoom of Eccles. Anno. 1667.* Yet I think that in some circumstantial cases, the Council may mitigate the Sentence upon this accompt. But it is never a defence against the relevancie: Such as are furious, are not in the construction of Law, capable to commit a crime, *Stat. 2. Rob. 2.* for the Law compares them to infants, or to dead men, *lege si quis ff. de acquirend. hered.* to such as are absent, *l. sed. si. ff. de injuriis*, and makes them to be no more guilty because of the crime they commit, then a stone from a house, or a beast is to be repute guilty and punishable for the wrong they do. *Quam si pauperiem pecus dederit aut tegula ceciderit, l. 5. ff. ad. l. aquil.* and the Law commiterats so far their condition, That it expostulats with such as would pursue them for a crime, & *non exigas penas ab eo, quem fati in felicitas excusat, quiq; furore ipso satis punitur. l. Infans ff. ad. l. Corn. de sicar.* they are excused by their own misfortune, and abundantly punished by their own fury: but since the Law protects furious persons from punishment, because they want all judgement. *l. 14. ff. de officio presid.* It follows naturally, that this privilege

ledge should be only extended to such as are absolutely furious.

2. It may be argued, that since the Law grants a total impunity to such as are absolutely furious, that therefore it should by the rule of proportions, lessen and moderate the Punishments of such, as though they are not absolutely mad, yet are hypocondrick and melancholy to such a degree, that it clouds their reason, *qui sensum aliquem habent sed diminutum*, which Lawyers call *insania*, and the Greek *ἡσυχαστής* 3. That such as shew any acts of resentment, or revenge, in the wrong they do, may be punished with some degree of severity; since they shew some degree of judgement: But yet the Parliament of *Paris* is justly condemned by all Lawyers, for having cauted execute a mad man, who had killed one that had struck him two dayes before, but since he did shew memory and revenge in that act, he might have been punished justly to some moderate degree.

4. Since there are some mad men who have lucid intervals, whose fury has its tides, and waxes and wanes, like the moon upon which it depends; *quos furor, stimulus suis variatis vicibus accendit. l. 14. ff. de officio præsidis*, that therefore they should be thought capable to commit crimes when they are in their lucid interval; but not when they are agitated by their fury. But here it may be doubted, whether the crimes committed by a mad man who has lucid intervals, should be presumed to have been committed by him when he was in his fury, or in his lucid intervals, and the general conclusion is, that though every man be presumed to be sound in his judgement, till the contrary be proved, *quia qualitas qua inesse debet, inesse præsumitur: Alciat præsump.*

1. Yet, when a man is once proved to have been furious, the Law presumes that he still continues furious, till the contrair be proved, for madnes is but too sticking a disease; and is seldom or ever cured. And this presumption should rather hold in the committing of crimes, then in any thing else; for the committing of a crime, looks liker the madnesse, then the lucid intervals. And yet if my opinion were of authority enough, I would limit this rule in two cases, 1. If the madnesse had fixt to an ordinary interval, as the hight of the moon in lunaticks, I would presume that if the

Crime

Cryme were not committed at that time, it behov'd to be presum'd it was committed in the lucid interval. 2. If the person offended was one against whom the offender had prejudice in his lucid intervals, or before his madnesse, or if he shew any wit or contrivance in the execution of the wrong he did, I would presume, that the offence was committed in the lucid interval: But because the Cryme in these cases would be founded upon presumptions, I think the punishment should be lessened upon that accompt; and possibly that Judge would not be much mistaken who would remit something of the ordinary punishment in all Crymes committed, even where the lucid intervals are clearly proved: for where madnesse has once disordered the judgement, and much more where it recurs often, it cannot but leave some weakness, and make a man an unfit Judge of what he ought to do, *est tantum adumbrata quies, intermissio, sed non respicientia integra*: And as our proverb well observes, *once Wood, ay the worse*.

It is statute by the 24. Chap. Stat. 2. Rob. 2. That a mad person shall be kept by his friends, and if he commit any wrong, it shall be imputed to his friends, and keepers; but though these may be made lyable civilly for any damage the furious man doth, as a Master is in Law liable for the prejudice done by a wild beast, which he keeps; yet it were too severe to punish them corporally for the murders, and other Crymes which he commits, except where they are commanded by the Judge to keep him exactly, which ought not to be extended against such as are only his Curators, or nearest of kin. *Bartol. ad l. divus, ff. de off. prasid.*

It is generally agreed to by Lawyers, that furious persons committing a Cryme in their tury, cannot be punisht for it, though thereafter they return to themselves: for in punishing Crymes, the time of the commission is to be considered; though *Fason*, *Tiraquel*, and some others are of opinion, that if the Cryme was very atrocious, the mad man recovering, may be punished. And for this they instance the Queen

of *Cassius*, who punished with death, a man who had in his fury wounded her Husband King *Ferdinand*; and they cite *l. 14. ff. de officio præsidis*. But the instance is founded upon the passion of a woman; and that Law speaks only of Crimes committed in a lucid interval. And whereas *Caballus* thinks such a punishment necessary, for satisfying the discipline of the Church; I should rather think, that the Church should of all other, least punish that misfortune, it being against Christian charity, to add affliction to the afflicted. And it were brutish for Church-men to be more severe, then the madness it felt was, which was so charitable as to take its leave. As a man should not be punished in his health, for what he did when he was mad: so upon the other hand, a man who committed a Crime in his health, ought not to be punished bodily, if he thereafter turn mad: for then he is not sensible of correction, which is one of the great designs of punishment. And to punish him then, were to endanger his soul: nor would the people be deterred from vice, but would rather be troubled with passion at such a spectacle: but yet he may be punished in his goods, *Clarus quest. 6.* tells us of one who was scourged for perjury, though it was alledged he was mad, but this last seems too severe, for the reasons foresaid; and since a mad man is lookt upon as absent, it may be justly doubted, whether he may be process'd during his madness, for a Crime committed by him while he was in health, even in order to the inflicting a pecuniary punishment: and that because absents cannot by our Law be try'd criminally: and because, mad men cannot inform their Friends or Lawyers, so as they may propose their just defences. But since absents may be try'd for Treason, by the late Act, it would therefore appear, that mad men may be likewise accused for Treason during their madness; It may be likewise doubted if he who used any means to make himself mad after his sentence, may not be put to death, notwithstanding of his madness, since that madness was occasioned by himself, and so should not disappoint the Law.

But

But *Clarus quest. 6.* is of opinion, that it ought to defend him from all corporal punishment, and *Caballus Casu 298. num. 27.* is also of opinion, that even he who commits a Crime whilst he is mad, though he himself occasioned the madness, yet he is not to be punished by the ordinar punishment, for the Law doth not presume that they made themselves furious upon design.

IX. Whether a collective body of people, or university, such as a Burgh, or Incorporation, may commit a Crime, seems debateable: And *Ulpian.* seems to deny it *l. sed & ex dolo ff. de Dol. Mal.* whose words are, *sed an in municipes de dolo detur actio, dubitatur, ego puto, ex suo quidem non posse dare, quid enim municipes facere possunt.* But I conceive that we may clear this point by these positions, 1. That properly Incorporations cannot commit a Crime; for they are *jas, non persona.* 2. Crimes which consist in omission, may be fixed upon Incorporations, as if their Magistrates omit what the Law commands. *L. Fabenius C. de Sacro-Sanct: Ecclesia & l. si procuratorem ff. mandati.* 3. In these things which are proper only to be done by Incorporations, such as in making Acts, raising, and using unlawful Judicators: Incorporations may be said to be guilty of what their Rulers commit: *Constit. freder. de stat. & consult.* 4. Even these Crimes which are ordinarily committed by privat men, such as *Murder, Oppression, &c.* are in Law sometimes charged upon the Incorporations; if these things be done by command of the Rulers, *l. Merum, ff. quod metus causa.* 5. No deeds of the Magistrats can infer a Crime against the Incorporation, except the body of the people concur: for they represent not the people in their Crimes, but in their Government: and they were not empower'd in their election to commit Crimes, *l. si procurator §. Celsus ait, ff. de condit. indebit.* 6. If one man oppose what may be a Crime, then the Incorporation cannot be guilty; for the university there cannot be said to offend: since all

concur'd not , & in damno vitando , potior est conditio negantis.

How far Incorporations may be punished , may be likewise clear by these positions , 1. The Incorporation offending, may be ordained to restore , in so far as they got advantage. *l. Metum autem ff. quod met. caus. & l. sed & ex dolo ff. de dol. mal.* 2. In these Crymes wherein the fathers may be punished with the children , such as Treason , Incorporations may be likewise punished , for their innocence is not more favourable , then that of Children. *Bartol.* gives several instances , where Towns have been for Treason condemned to be plow'd. 3. If an Incorporation offend in doing things that are only proper to be done by Universities, then the University may be punished, by confiscation of a part of their common-good: but if an University should proceed to commit a Cryme , which is usually committed by private persons , such as the going with displayed Banners to oppress their neighbours , then , as the deeds of privat citizens cannot wrong the Incorporation ; so neither can the deeds of their Rulers. And *Bart.* is of opinion, that if the Incorporation be fin'd , such as are innocent should not be liable to pay any part of it , but it should all fall upon the actors, *Arg. l. 1. ff. de Magistrat. conveniend.* for they were not empowered in their election to commit Crymes, as said is.

TITLE

T I T L E II.

The division of Crymes.

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1. *Crymes are publick or privat.*
 2. *Ordinary or extraordinary.*
 3. *Capital or not capital.*
 4. *Occult or manifest.*
 5. *Atrocious or not atrocious.*
 6. *Statutory and such as are not punish'd by exprefs Statute.*

Crymes are divided by the Civil Law, into publick Crymes, and privat Crymes, publick Crymes are defined to be these, which any privat person may pursue, for publick revenge, and whereof the punishment is stated by an exprefs Law, §. 1. *institut. de publ. jud.* And a privat Cryme which none can pursue, but the party injured, and which is not declared to be a publick Cryme by an exprefs Law. But many of the Doctors, do of late conclude, that all Crymes which are punishable by the Statute of any particular Countrey, are *eo ipso*, to be accounted privat Crymes, *statuta enim sunt leges judiciorum privatorum* Bal. *ad leg. ult Cod. qui testa fac. poss.* Yet this appears to be a mistake, for if a Statute should allow any person whatsoever to pursue the Cryme, therein forbidden, that Cryme would be doubtless a publick Cryme; for the true notion of a publick Cryme, seemes to be that, wherein the Common-wealth is immediatly concerned either by Interest, or Example; by Interest, as in Treason, or coining of false Money: by Example, as in Murder, Witchcraft, &c. In which, though

though the Common-wealth be not immediately concerned ; as a body , yet every particular person of that body is concerned ; because he who committed that Cryme , may commit the same again , & *semel malus , semper præsумitur malus , in eodem genere malitia*. So that every ones having power to pursue a Cryme , or a Crime being declared publick , by an expresse Law , are not the true constitutive differences , betwixt a publick Cryme , and a private ; but are only the effects thereof : for when the Kingdom , or State , doth find that any Cryme , is of dangerous , and universal consequence , then they allow , very justly , that every privat man may accuse. With us in *Scotland* , the vestiges of this distinction , are yet to be seen for , albeit his *Majesties* Advocat may pursue without the concurrence of the party injured : Yet no other person will be allowed to pursue any Cryme , *nisi suam vel suorum injuriam prosequatur* , and that every privat person , may not pursue in all Crimes ; is clear , from *c. 2. lib. 4. Reg. Maj.* where in Treason , it is said , that every man may pursue , which had been unnecessary , if every person might pursue in every Crime , and thus

Mc cal having raised Letters in his own name , against *Charles Lindsay* , for killing his Father , in *July 1668.* the Justices would not sustain the pursuit at his instance , because he could not prove that he was son to the defunct , and since his *Majesties* Advocat , represents in all criminal pursuits , the publick : and as it is presumeable , that he will not refuse his concurrence , so he will be punished , if he refuse the same. It were therefore inconvenient , and unnecessary , that every privat man should be allowed the liberty , of pursuing Crimes , in which he were not interested : this distinction is much abused in the Books of *Reg. Maj.* For in them publick Murder is defined to be that , which is committed by forethought felony : and private Murder , which is committed without being known to any , but the persons who were complices , *stat. Malcolm. 2. c. 15.*

II The Civil Law , likewise divides Crimes in ordinary , and
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extraordinary ; extraordinary were these wherein the Law had appointed no particular punishment ; ordinary crimes were such as were punishable by a liquid pain, determined by the Law, and was therefore called *crimen legitimum*.

III. Crimes are likewise divided, into such as were capital, or not capital. Capital crimes are such, as are punishable by death, banishment, or loss of liberty : so called à *capitis diminutione* ; but with us these crimes are only called capital, which are punishable by loss of life or limb.

IV. Crimes are either occult, or manifest : occult crimes are these, which either are occult of their own nature, as Hamefucken, Conspiracy, Adultery, or such as are occult by accident, such as Murders committed by Inn-keepers upon their Guests. Though murder of its own nature be not occult, since it is oft-times openly committed. This division is considered by Lawyers, either in order to probation ; because in occult crimes less exact probation is accepted : And thus with us the being rob'd at Sea was found probable by these in the Ship, because no other probation could be had there. And it is against the interest of the Common-wealth that Crimes should pass unpunish'd : Or they consider this division with respect to prescriptions, because it is debated whether when a Statute appoints a Crime to be pursu'd betwixt and such a day, that time should run in occult crimes, from the time the crime was committed, or from the time it was known. In occult crimes also, torture is admitted more easily than in other crimes.

V. Crimes are divided in such as are atrocious, and such as are not. Atrocious crimes are these wherein the guilt is very great.

VI. In Scotland, crimes are divided in statutory, and such as are not punished by an express Statute, as common Adultery, Bestiality, &c. And albeit it was controverted in the Lord *Rentouns* case, Jan. 1666. that the poynding of Oxen in the time of labouring, could not be accounted a crime, because it was not declared punishable by an express Statute, yet the Justices found, that *eo ipso* it was forbidden by a Statute : It was in so far a crime, because

because Authority was thereby contemned, especially having been formerly declared a crime by the Civil Law. And it were unreasonable to think that Adultery, albeit it be not notour, should be a crime, albeit its penalty is not exprest by a Statute. And with us especially of old it was most ordinary to forbid crimes without exprest sanctions, as may be seen in several Acts of Parliament: Likeas by the Civil Law, extraordinary crimes were declared to be such, as were forbidden by Law, but where the penalty of the Law was not determined, from all which it appears, that the essence of a crime consists in its being forbidden, and not in having its punishment stated by an exprest Statute, though I wish it were otherwise.

What Crimes are called Crimes of the Crown, or Pledges of the Crown, is treated largely *Title Regalities*: What Crimes are called *Crimina excepta*, is declared in the *Title Treason*.

TITLE

T I T L E III.

Blasphemy.

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- 1 *What is Blasphemy ?*
 - 2 *The several kinds of Blasphemy.*
 - 3 *Whether Ignorance, Repentance, or Railery be good defences against the punishment.*
 - 4 *What is the punishment of Blasphemy, by the common-Law.*
 - 5 *What by our Statutes ?*
 - 6 *Cursing of Parents, and swearing, how punished ?*

Blasphemy is called in Law, *divine lase Majesty*, or *Treason*; and it is committed either by denying that of God which belongs to him, as one of His Attributes: or by attributing to him that which is absurd, and inconsistent with his Divine Nature.

II. These who swear by the Head, or Feet of God, are guilty of this Crime by the common Law, c. 51. *si quis per dei capillum* 22. quest. 1. *videntur enim amplecti anthropomorphitarum heresin qua membra deo tribuebat*: By that Cannon they are also punishable, who delate not Blasphemers. Albeit regularly what is spoken in passion be more moderately punished, yet it lessens not a Blasphemers Crime, *Hosien. tit. de maled* except he speak at such a rate, as clearly indicats that he is furious, or somewhat distracted: or if he recover himself, and testifie immediatly his contrition; thus *Socin. relates consilio* 102. that a Jew who had denied the Omnipotence of God, was absolved from a pursuit of Blasphemy, because he immediatly threw himself upon the ground, and kist

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it, and testified an extraordinary horror, which Lawyers say, is an extraordinary punishment, and oftentimes exceeds the fear of Death. And there are some Lawyers, as *Abbas & felin ad cap. 13. de jure jur.* who conclude, that either he who blasphems passionatly, is unlawfully imployed when he falls into that passion, as in playing at Cards, Drinking, &c. and then his passion doth not lessen his Crime: But if he be honestly employed, as doing business, treating for his Friend, and then if he blaspheme only in passion, it lessens his guilt, and should mitigat his punishment: but why should passion excuse Blasphemy more then Murder; if it be not because the fall cannot be repaired by Repentance, a man being killed, but the fault in Blasphemy may be extinguished by Repentance.

III. *Clarus* thinks that these who Blaspheme in jest are to be less severely punished; and that Rusticity mitigats the ordinary punishment in this case; but *Gothofredus* is, as to the last, of a contrary opinion, because Rusticity excuses not from the knowledge of the Law of Nature, much less of God, but they may be reconciled thus, that open gross Blasphemy, is equally punishable in both; but not consequential and indire&t Blasphemy, as if a Countrey-man should erre in the Persons of the Trinity, which some remot High-landers are so ignorant of, as not to know, those should rather be pitied then punished, except they add obstinacy to Blasphemy, *vid. Cabal cas. 296.*

IV. The punishment of Blasphemy, is Death by the Law, *Nov. 77.* by the Canon Law: Publick repentance for the first fault, and the standing at the Church Door, with an infamous Mitre, or Paper Hat for a relapse.

V. By our Act 21. *Seß. 1. Par. 1. C. 2.* Blasphemy, Railers against God, or any of the Persons of the blessed Trinity, shall be likewise punishable by death, if they obstinately continue therein. From which Act it is observable,
 1. That this Crime can only be tryed before the Justices;
 and

and therefore not before the Lord of a Regality, though they have equal power, as hath been formerly observed. 2. Distraction is only excepted here, so Ignorance, Passion, Rusticity, or Railery excuses not; *nam exceptio firmat regulam in non exceptis*, and yet these may excuse from the ordinary punishment, in some circumstances; but are never defences against the relevancy. 3. It may be doubted, why the denying God, or any of the Persons of the Holy Trinity, is only punishable by death, if they continue obstinate therein. And yet the railing upon, or cursing God, or the Trinity, is simply punishable, without obstinacy: and the difference seems to be, that cursing, or railing against God, cannot proceed from Ignorance, but argues Malice: whereas the denying Gods Attributes, or the Trinity, may proceed from Ignorance.

It may be doubted, if with us a person who should call himself the Son of God, or the Messias, could be punished as a blasphemer; and it is said that the Parliament of England thought he could not: and therefore *James Nailor* was only scourged for this Crime. Yet I think he could be reached by our foresaid Act, as a person who rail'd upon God, and the Trinity. For to make our selves equal with them, is to rail against, and vilifie them.

VI. Cursing of Parents, *viz.* Father, or Mother (but no others) is punishable by death, if they be past sixteen, or arbitrarily if they be below sixteen, and above punishable, (*vid tit. parricid*) Act 20. Par. 1. Sess. 1. Ch. 2.

Justices of Peace are by the 38. Act 1. Par. Ch. 2. to punish such as curse and swear profanely, and exact from a Noble man twenty merks, a Barron twenty merks, a Gentle man, Heretor, or Burges ten merks, a Yeoman fourty shilling, a Servant twenty shilling, a Minister the fifth part of his Steipend, and the Husband must pay his Wifes fine, *ergo regulariter*, the Husband is not liable for the Wifes fine, if there be no warrant therefore by Statute. By the 16. Act 5. Par.

Q. M. the swearing abominable Oaths are to be fin'd, but that **A&** is only temporary. By the 103. *Act Par. 7. 7.* swearers and blasphemers are to be punished by the Magistrats, and if they fail, by the Privie Council. *Nota* by this **A&**, that Women are to be punished in penal Statutes, conform to their Blood, and their Husbands quality; that is to say, conform to their Blood if unmarried, or to their Husbands quality if married: and therefore may be doubted, whether these Women who have precedency according to their Birth, though married, as an Earles Daughter, when married to a Gentle man, or those who have precedency by a Patent, above their Husbands quality, should not be punished according to their precedency, though married.

The Justices did in *May 1671.* fine a Woman in *Dumfries*, in 500 merks for drinking the Devils health, but did not find it Blasphemy.

TITLE

TITLE. IV.

Hæresy.

1. *The definition of Heresy.*
2. *Whether Invocation of Spirits be heresy.*
3. *The punishment of Heresy.*
4. *Jesuits and trafficking Priests how punished.*
5. *The specialities introduced in punishing this Crime.*

Heresy is committed, when a Christian owns pertinaciously Errors condemned by the Church. I said when a *christian* own'd them, because Pagans and Mahumetans are not punish'd as Hereticks. *Simancas de hæresi. cap. 31. num. 3.* for these are enemies to our faith in general, and erre not in particular points of it. I said who err'd pertinaciously, because such as erre ignorantly, or as having err'd perversly, do not pertinaciously adhere to their error; are not to be esteem'd hæreticks. And this repentance is to be receiv'd any time, even after sentence to stop the execution. *Carer. fol. 642.* except they have relaps'd in their Heresy, for their second fall is not to be taken off by repentance, but though their repentance secures them against death in the first fall, yet the are to be punished by perpetual Imprisonment. *Ignens: in: l. ff. ad Sillan: Cook. hoc. tit.*

II. Though some make the adoration, and invocation of Spirits to be Heresy, yet others do more judiciously determine that if these devils be invoked to reveal things to come, then that invocation is of the nature of Heresy, for that is to attribute omniscience to the Devil, which is one of Gods attributes; but if the Devil

Devil be invocked for a particular end, or interest, such as that he may learn the invocker how to prevail with a mistress, or how to gain a Princes favour, in these cases the invocker is not to be call'd a Heretick. *Clarus. S. Heresis. num. 25.* but neither do's that distinction please me, for such as invocck the Devil are not properly Hereticks, especially if they have renounced their Baptism, for there is no reason to call them Hereticks who not only erre in the faith, but have renounced the faith intirely, and as Pagans are not Hereticks because they worship false Gods, so neither should they who worship the Devil, and these who have renounced their Baptism, for they are in the same condition with these who were never baptized.

III. The punishment of Heresie, in the opinion of the Doctors, is to be burnt, and confiscation of the Delinquents Moveables, *Clar. num. 13.* But by the Law of England, Hereticks are only to be burnt if they will not abjure.

By our Law Heresie was in the first instance try'd by the Church, and the Secular power did not meddle to condemn Hereticks, till they were first condemned by the Church, *fa. 1. Par. 2. A&T. 28.* In which it is ordain'd that the Bishops shall inquire into Heresie, and if they be found, that they be punished as the Law of the Holy Kirk requires: and if it missters, that Secular power be called in support, and helping of holy Kirk.

From which A&T it is observable, first, that the Kirk was Judge to Heresie, in *primainstantia*, during Popery: and this is conform to the opinion of almost all the Doctors, who think heresie *crimen mere Ecclesiasticum*, *Alcia. in c. 1. num. 37. de offic. ord.* but they justly conclude, as in this Statute, that the cognition belongs to the Church, and the punishment to the Secular Judge, and this Canonists calls *tradere hereticum brachio Seculari*: and *Clarus* do's to far appropriat this tryal to the Ecclesiastical Judge, that he allows not so much the Secular Judge as the power of mitigating the punishment: and yet now the Justices are Judges competent, in *prima instantia*,

to such as hear or say Mafs, but the reason is, because such are in general condemn'd by the Church, as guilty of Heresie, and yet the Popish Church are still Judges to the Protestants, though they be condemn'd in general as Hereticks; for the Hereticks are try'd and condemn'd first by the Ecclesiastick Judge among them.

The second thing remarkable in this Act, is, that amongst Ecclesiasticks, the Bishop is the first Judge in Heresie, which is also conform to the opinion of the Canonists, *Clar. h. t. num. 5.*

After the Reformation, there was a Confession of Faith made, and is set down by King *JAMES* in his first Parliament, and Ratified *Act 4.* And they who profess not the true Religion may not be a Judge (but this is not extended to Heretick Offices) Procurator, nor Member in any Court, *Ja. 6. pa. 1. c. 9.* and such Church-men as will not subscribe that Confession, are deprived, *Ja. 6. pa. 3. Act 46.* and all such as refuse to subscribe, are to be repute Rebels and enemies to the King and his Government, *Act 47.*

IV. Our Law fearing the pains taken by the Romish Church, more then the hazard arising from any else, have been more severe to these, than to others: And therefore the sayers or hearers of Mafs, or such as are present thereat, are punished, 5. *Act 1. P. J. 6.* by confiscation of all their goods, moveable, and immoveable, and an arbitrary punishment of their persons for the first fault, banishment for the second fault, and death for the third fault. It may be doubted, if such as hear Mafs for curiosity, may be thus punished, which is very ordinary abroad; and it seems that Heresie must be an act upon design, and yet this Law makes no distinction here. 2. It may be doubted, if by confiscation of Goods immoveable, be meant Land and Heritages, for they are call'd *bona immobilia*: and yet I rather incline to think that this should only extend to Heritable Bonds, and such like, but not to Lands: for Heritage uses alwayes to be exprest distinctly, when the confiscation.

on of it is design'd: And if Heritage were forfeited by the first fault, the punishment of the first fault would be greater then the punishment of the second fault, which is only banishment: Nor do's Heritage use to be exprest under the word Goods. But thereafter the sayers of Mass, and trafficking Papists, and the receivers of them against the King's Majesty, and Religion presently profess'd, are declared guilty of treason, *Act 120. Pa. 12. Fa. 6.* But from these words, *Against the King's Majesty, and Religion presently professed*, it may be argu'd, that only such Jesuits, and others, as traffick to the prejudice of the King's Person, and Government, such as these who attempted the Gun-powder-treason, or to kill the King, or raise Rebellion, are only guilty of Treason, which seems the rather, because it were hard to make simple endeavouring to perswade others in meer matters of Religion to be treason. It is also observable from this Act, that such Jesuits, or trafficking Papists, or receipters of either, as satisfies the King and Kirk, are not to be guilty of treason; so that here treason is taken away by repentance: but it may be doubted, if though they be not guilty of treason, they may not be punish'd as Hereticks, conform to the above-cited 5. *Act. 1. Pa. Fa. 6.* for the Act only declares that the penalty foresaid shall not strike against them. And though (as I observed formerly) such as are guilty of Heresie, may by repentance save themselves from the punishment of death, yet are they still declar'd lyable to other punishments, such as perpetual imprisonment. But yet since our Law appoints no other punishments against Traffickers, and receipters of Jesuits, but what is exprest here, and that the punishment here exprest is taken off in case of repentance; I rather believe that no punishment can be inflicted, in case of repentance, against these. And it is very reasonable, that meer errors in faith should be pardon'd by meer repentance; but as to the sayers and hearers of Mass, the former Act seems to stand.

The Sellers also, and dispersers of erroneous and Popish Books, are to be punish'd arbitrarily, by the Rubrick of the 25. A^ct 11. *Pa. Ja. 6.* but the statutory words run only against the home-bringers of such Books, the Books also are to be destroyed, and warrant is given to Magistrats of Burghs with a Minister, to intromet with them without hazard of spuilzie: But yet *de practica*, other Officers, such as Sheriffs, and Lords of Regality do intromet with such Books, though they be not warranted. And though *inclusio unius est exclusio alterius*, and though the A^ct ordains a Minister to be present (which was certainly appointed that it might be known whether the Books were Popish) yet *de praxi*, Magistrats use to intromet without having a Minister present.

I find no expresse punishment against other Hereticks in our Law, nor *de praxi*, are other Hereticks punish'd corporally; but whether they may not be punish'd conform to the common Law, and upon that general A^ct of *K. James* the First, I will not determine. As also, it is ordinary to banish only Jesuits, and sayers of Mass, as was done *December 9. 1573.* Mr *John Robertson* was banished by order from the Council, he enacted himself under the pain of death never to return to *Scotland*.

V. The common Law, or Doctors have introduced many specialities in the tryal of this Crime, as first, that less clear probation is admitted in proving Heresie, then other Crimes, *Clar. §. Hæresis, num. 20.* And by an old A^ct of *Sederunt, socii criminis*, Women, and Pupills, are to be admitted with us, to prove hearing, and saying of Mass, else that Crime could not be proved. 2. A Heretick may be try'd after death, *Alber. in rubr. h. t.* which they say holds not only in a Heretick found guilty by probation (*Hæreticus verus*) but in these who were cited to compear for Heresie, but compeared not, whom they call *Hæreticum præsumptum*, but this holds not with us, no not in these who are guilty of Treason, as being Trafficking Jesuits or Papists, for only Perduellion is by our Law to be try'd after death: But though the Heretick cannot be punish'd after death, yet his opinions may be condemn'd, as Heretical, even after his death,

TITLE V.

Simony, Baratry.

- 1 What is Simony?
- 2 How it is probable.
- 3 The nature and punishment of it in Scotland.
- 4 Baratry Ecclesiastick.
- 5 Baratry Civil.

Simony is the selling or buying any Church Office, *cupiditas emendi aut vendendi aliquid spirituale aut spirituali annexum*. So called from *Simon Magus*, who offered to buy the Grace of God. And the Canonists teach, that it is Simony to paction for any advantage in administering the Sacraments, but not to take reward after they have administered them.

II. In this Crime, infamous persons, whoors, and other witneses, who are not *habiles*, or at least, who are not *omni exceptione majores*, are here receivable *cap. sicut, de Simon*. because it is ordinarily carried on with much privacy, and clandestine dealing, for which reason likewise, Lawyers conclude, that it may be proved by presumptions. It is *crimen mere ecclesiasticum*, and cannot be punished by Laicks, the punishment is depravation.

III. With us, Simony is once mentioned, and that is, *Act 1. Par. 21. Fa. 6*. Wherein it is Statute, that if the Arch-Bishop, or Bishop deprehend that the person who is presented hath made any Simonaical paction with the Patron, whereby he hath so hurt the Benefice, as that he hath not reserved a sufficient maintenance for himself, and his successors, suitable to the value of the Benefice, that the Bishop may refuse the presentation, and the Lords of Session are declared to be

be Judges to any debates arising betwixt the Bishop, Patron, and Person upon that account. From which Act it is observable, 1. That it is implied, and tacitly acknowledged, that Simony is a Crime by our Law, seeing this is punished as a Branch thereof: and therefore I conceive, that what ever is punished as Simony by the Canon Law, is punishable with us; and that a Minister, or other Benefic'd Person who bargains, or transacts with any to get them a Church, or Benefice, and gives or promises Money therefore, is punishable even by our Law. 2. That by this Act, a paction, whereby the incumbent reserves to himself, a competencie suitable to the Benefice, is not Simony; and what this competencie is, is left arbitrary to the Judge, because it is not determined. 3. That this Crime is probable with us by Oath, because of its clandestine conveyance, as said is. By the *Stat. Eliz.* 31. the person committing Simony, is declared incapable to enjoy that Ecclesiastick Office.

IV. Baratry is a kind of Simony, (*Socinus reg.* 55. *Bald. part. 5. Consil.* 21.) which with us is committed by these, who go to Rome to buy Benefices, without licences from the Chancellor, or their ordinar, *F. 1. P. 7. cap.* 106. the pain of it is banishment, and never to bruike honour, or employment for the future, within the Kingdom. This word comes from the Italian word Baratry, which signifies, corrupting of Judges; for our Law presumed, that these who went to Rome to get a Benefice, designed to get it by corruption. But though Baraters are called *canpones beneficiorum* by the Doctors; as *Craig* observes, *pag.* 371. Yet our Kings being of old very submissive to the See of Rome, durst not directly at first, forbid application to Rome; but did only forbid the carrying abroad Money out of the Kingdom; knowing that nothing could be done there without Money: But thereafter this Crime growing greater, the Parliament did by the *84. cap. P. 6. F. 3.* forbid expressly the going to Rome, to purchase Benefices, or to be its collectors, under the pain

of being demean'd as Traitors, and never to bruike Benefice; or use Worship; which is ratified by the 53. *Act* 5. *P. F.* 4. But though the punishment is that of Treason, by these Acts; yet by the 2. *Act* 1 *P. F.* 6. the punishment of Baratry, is declared to be prescription, banishment, and never to bruike Honour, nor Office within the Kingdom: and all applications to *Rome* are punishable as Baratry. This *Act* being after the Reformation. And by this last *Act*, it is declared that Baratry may be punished, either by the Justices, or Lords of Session. And upon this *Act* *James* Arch-Bishop of *Glasgow*, was excommunicated after the Reformation, for going to *Rome*.

V. The Sons of Noble Men, and others passing to Schools beyond Seas without the Kings Licence, are also said to commit Baratry, *F.* 6. *P.* 6. *cap.* 71. And the Council uses to ordain Noble Men, who breed their Children abroad, in Popish Schools, to bring them home under a great fine, as they did lately to the Lords of *Mordingtoun*, and *Semple* in anno. 1668. Before which *Act* also, all Laicks going out of the Kingdom, without consent of the King, or Licence from the Chancellor, committed Baratry. *F.* 4. *P.* 5. *cap.* 53. And though *Craig* debates *pag.* 371. whether the punishment of this be the same with Treason, because it is said to be punishable as Treason, *cap.* 84. *Pa.* 6. *F.* 3. Yet it is clear, that this punishment is restricted by the *Act* 2. *P.* 1. *F.* 1. To the being declared incapable of Trust, and Banishment. This Prohibition of Laicks going abroad, was first at *Carthage*, and is now in vigour at *Naples*, and many other places. And though it be now in desuetude, at least is not punished, except in Privy Councillours: Yet I see no reason, why any should say, that this Crime takes only place in Vassals, holding immediately of the King; for the *Act* is general. And yet Merchants are warranted by divers Acts of Parliament, to Traffique abroad, and so fall not under this Prohibition.

T I T L E V I.

Treason.

Læsa Majestas.

1. *Treason is divided by the Civil Law in Perduellion and Læsa Majestie.*
2. *The differences betwixt Perduellion and Læsa Majestie.*
3. *Treason with us may be divided in Perduellion Læsa Majestis and Statutory Treason.*
4. *The nature of Perduellion, or rising in Arms, which is the first species of Treason.*
5. *The second species of Treason is committed against the Kings Person.*
6. *The third is the receiption such as have committed Treason:*
7. *The fourth is to hold out Houses against the King.*
8. *The fifth is to assail Castles where the King resides.*
9. *The sixth is to raise a fray in the Kings Host.*
10. *The seventh is to trouble any who kills a declared Traitor:*
11. *The eighth is to impugn the Authority of the three Estates.*
12. *The ninth is to decline the King or Councils Authority.*
13. *The tenth is to conceal, and not reveal Treason.*
14. *The eleventh is to desert the Kings Host.*
15. *The twelfth is to deny the Kings Prerogative, in having the sole power in calling and dissolving Parliaments.*
16. *How the killing Counsellors is punishable.*
17. *The several branches of Statutory Treason.*
18. *To accuse any man for Treason, if the accused be assoilzied, is Treason.*
19. *Treason is not Ba'eable.*
20. *Summonds of Treason ought to be execute by Heraulds.*

21. *Whether*

- 21 *Whether less probation be sufficient in Treason then in other Crimes.*
 22 *Treason may be pursued after the Committers death.*
 23 *Traitors may be forefaulted in absence.*
 24 *How disobeying the King is punishable.*
 25 *The punishment of Treason in general.*

UNhappy man retains in nothing so much a desire to be like his Maker, as in that he would be Supreme: and no wonder that this Crime should be incident to him in this lap'd condition, when his will is crooked, and his judgement blind; since the very Angels in their purity, and Man in his innocence, were tempted by it: so that since men have subjected themselves to Government, we may easily conclude they found a great convenience in this submission; else they had never offered so much violence to their own inclination. To Societies, and Laws, we owe every moment the preservation of our lives and fortunes, which nothing but Discipline does secure: and without an intire submission, these Societies would be but Companies of Robbers, and Laws but meer toyes. How many dangers do Governours incur? And by how many cares and tears are they disquieted? Wherefore it is most just, that those who govern, should be more secure against their Subjects, then against their enemies, since they may be most easily wrong'd by those who live in their own bosome, and who have easie and open access to them. In other Crimes, one, or at most few, are wrong'd: whereas in rebellion, and *Lese Majestie* the whole Society is offended. And therefore it was most just, that those who design the ruine of the Commonwealth, or the Supreme Governour (which Crime we call Treason) should of all others be most severely punished. And the *Basilicks*, l. 1. b. 1. observes well, that Treason is a kind of Sacriledge, ο περι των επιβαλων κορυφαις εστι το περι ιεροσυλιας.

I. Treason was by the Civil Law divided, in *Perduellionem*, & *Læsæ Majestatem*. *Perduellion* was that Treason which was committed against the Prince or Common-wealth immediately: *Adversus populum Romanum, vel securitatem ejus*. *Læsæ Majestæ* (as opposed to *Perduellion*) was committed by speaking against the Prince, revealing his secrets, &c.

This Crime was punish'd *per legem juliam*; the branches whereof are the raising of Arms against the State, the being in accession to the flight of such as were Hostages to the Common-wealth; or to the killing of any Magistrat of the Common-wealth, the keeping correspondence with the enemies, the continuing to govern a Province after a Successor was named; the Levying of an Army, and running in to the Enemies. All which are expressly enumerat *ff. ad leg. Jul. Majest.*

II. Betwixt these two, *Hottoman* assigns these four differences, 1. That *Perduellion* was that whereby the Common-wealth was in general wrong'd, *qui summam rei publicæ labe facere conati sunt*. *Læsæ Majestæ* was that whereby the Common-wealth was only wronged in a part, or by consequence; as to suffer the enemies of the Common-wealth to escape, or to conceal them, &c. The 2. is, the Crime of *Læsæ Majestæ* might have been pursued before the ordinary Judge *in foro*; but *Perduellion* could not be pursued but in the great Meetings of the People, *à populo Romano, comitiis centuriatis in campo martio*. Whence probably did arise the judging Treason by Parliaments with us. The 3. was, that the Crime of ordinary *Læsæ Majestæ* was not punished with death, as *Perduellion* was, but with banishment. The 4. was, that the ordinary *Læsæ Majestæ* was punish'd by death, but *Perduellion* was punishable after death.

III. Treason may be with us divided in *Perduellion*, which we call High Treason, called by the *English Law alta proditio*, or rebellion, which is only with us a rising in Arms against the King; and in ordinary Treason and *Læsæ Majestæ*, such as

to conceal, and not reveal Treason. And in Statutory Treason, which is not Treason properly of its own nature, but is declared to be so by a particular Statute, as is that of Murder under trust, Theft in Landed-men, &c.

IV. Perduellion in the Civil Law, is that which we call Rebellion in our Acts of Parliament, and it was so called *extravagan. Hen. 7. qui sunt rebelles*: And there it is Statute that *rebelles & infideles, imperii, qui quomocunque aliquid machinantur contra prosperitatem imperii*. But I find not the word *Rebellion* used in the Law before that time. Yet sometimes Rebellion is in our Law taken for that which is committed against the Kings Person, as in the 3. Act 1. Parl. K. Ja. 1. where it is said, No man shall rebell against the Kings Person openly, nor notourly: But the Adverb there used *openly and notourly* in that, and the subsequent Acts, interprets sufficiently the word rising against the Kings person, to be the same with us that is called Perduellion in the Civil Law, *viz. Si quis hostili animo adversus principem, vel rempublicam animatus sit*. To raise Arms against the King then, or to rise in open rebellion, is the first and highest degree of Treason, Ja. 2. Par. 6. Act 25. where it is called a raising in fear of War against the King; which Act comprehends all the kinds of Treason, like *lex prima ff. ad L. Jul. Majest.* And therefore I will follow that method. And though it be added in that Act, that it shall be Treason to rise in fear of War against his Person, or Majesty, or what ever age he be of, without the consent of the three Estates: Yet the consent of the three Estates will not defend the rising in Arms against the King, as was found in the case of the Marquis of Argyle, being pursued upon this Act, in Anno 1662. for rising in Arms against the Marquis of Montrose then the Kings Commissioner. For the Analysis of that Act must run run so, as that these words, *Without consent of the three Estates*, cannot be added to all the former treasons committed against the Kings Person, which are contained in that Act; For many things in that Act could

could not be justified by the Authority of the three Estates, for else the three Estates, and not the King, would be Sovereign: for they only are Sovereign, against whom Treason can be committed. But these words must only be taken as added to the last Crime prohibit, which is the assailing of the Castles, or Houses where the Kings Person is, which may be lawfully done by Authority of the Estates. For if the King being very young, were taken prisoner, as our Kings oft-times were in their minority, it had been absurd to think, that these who went to assail, by the authority of the three Estates, that Castle where the Kings Person was, should be punish'd as Traitors, because of their obedience. But to suppress all pretext that might arise from that Act, it is declared by the 5. *Act 1. Parl. 1. Sess. Ch. 2.* That the King hath the only power of making War, and Peace. And that it shall be Treason for any number of men, less or more, upon any ground or pretext whatsoever, to rise, or continue in Arms, to maintain any Forts, Strengths, or Garisons, or to make Leagues or Treaties amongst themselves, or with forraign Princes, without his Majesties authority and approbation first interponed thereto: or to attempt any of these things under the pain of Treason. From which Act it is observable, 1. That the authority of the three Estates is not able to defend the rising in Arms, or making Leagues, seeing that is declared to be his *Majesties* prerogative. 2. That the rising in defensive Arms is Treason by these words, *upon what pretext soever.* 3. That *nudus conatus* is in this case Treason by these words, *to attempt.* By the *English* Law the conspiring to raise a War is not Treason, except it be *de facto* rais'd; and with them, if three or four rise to throw down private Houses, or for any privat cause, it is but a Ryot; but if these three or four rise to reform Laws, or Religion, or upon any publick account, then it is accounted the Levying War against the King, *Cook hoc tit. pag. 9.* who likewise tells us, that if three conspire to Levy a War, it is Treason, if in the meer conspirers, if the rest thereafter Levied actually a War, though

he was not present; and in that sense only I would interpret the severe *l. 19. Basil. b. 1. propter cogitationem dignus est pena* δια τὴν ἐνοίαν αὐτοῦ ἐσιμαρτίας. And the English Law requires still *ouvert fait*, an open deed. This rising in Arms is likewise called *sedition regni vel exercitus Reg. Majest. lib. 4. cap. 1. & cap. 11. ibid. ad tit. sedit.*

The second species of Treason, is to commit Treason against the King's Person; and I find that this is the first kind of Treason express'd in the former *Act 25. Parl. 6. Fa. 2.* whereby it is declared Treason to lay hands upon his person violently, what ever age he be of. Which words were added to clear that it was Treason to rebell even against his authority before he was Proclaimed, or Crowned. For the being Crowned or Proclaimed, is *tantum declaratoria juris, sed nihil novi juris tribuit*; it being the *jus sanguinis*, and succession of blood which makes him King. This species of Treason is likewise declared, *Act 3. and 4. Parl. 1. Fa. 1.* and in thir cases *affectus sine effectu punitur*: and thus the Master of *Forbes* was hurled through the Calley, hanged and quartered, for imagining (this is an English term which signifies a design) to shoot *K. James* the 5th. 17. July 1537. And the Countess of *Glames* was burnt for imagining to poyson the said King *James* the fifth, 17. July 1537. By the Law of *England*; it is not Treason to kill a King out of possession, *Cook pag. 9.* But this seems unjust, if the King's title be clear, as our Kings was in exile. Though in dubious cases, such as betwixt the *Bruee* and *Baliol*, possession may difference the case. To kill the King's eldest Son, is with them Treason, 25. *Stat. Edw. 3.*

The third species of Treason is, the resetting any who hath committed Treason, or that supplies them in *redde*, help or counsel, *cujus opera dolo malo hostes populi romani pecunia alia-ve re adjuti erant*: This is likewise discharged, *Act. 97. Parl. 7. Fa. 5.* Where all the Liedges are forbidden to reset, supple, or maintain our Sovereign Lords Rebels, under pain of death: and if any disopey, to inforce (*id est*, to second the King)

King) against notour rebels, against his person, when they be required and commanded, they shall be punished by the King as favourers of such Rebels, except they have for them a reasonable excusation, *Act 4. Parl. 1. Ja. 1.* From which Act it may be debated the refusing to assist against rebels that are not notour, or against Rebels that have not committed any other Treason then Perduellion, cannot infer with us the guilt of Treason. The Doctors here debate, whether a Wife resetting her own Husband, or a Father his Son, commits Treason. And albeit it may be alledged, that the relation of Sovereign and Subject, is the chiefest of all others, and so all other relations should cede to it; and rebellion against the State looses all relations, *l. postliminium ff. de capt. & postlimin.* Yet the ordinary distinction is, that if any of these relations assist a Rebel with things that are necessary for him as a man, as meat, drink, &c. In that case they are not guilty of Treason; But if they assist these relations with any thing that may be serviceable to them in their Treason, then they are guilty, *Farin. quest. 113. num. 280.* And *Mathews hoc tit. cap. 2. num. 20.* For albeit Rebels lose all the priviledge of the Municipal Law, yet they retain those priviledges that flow from the Law of Nations, and Nature, *Bartol. ad l. amissum, ff. de capt. & postlim.* And thus *Cæsar* pardoned *Pompey's* Sons, and *Tiberius Piso's* Son, albeit they followed their Fathers after they were declared Traitors. But I find in our Law many decisions of this question, as in *July 1537.* where *Fanet Douglas* Lady *Glames* is convict and burnt, for fortifying and assisting the Earl of *Angus* and *George Douglas* her Brethren, Traitors and Rebels. And 18. *July 1537.* the Mr. of *Glames* is hang'd and drawn for concealing, and not revealing the treasonable design of his Mother to poyson the King: but the Countess of *Errol* being pursued for assisting the Earl of *Bothwell*, at least for not revealing a Letter she had received from the Earl of *Bothwells* Lady, desiring assistance: It was alledged for the Lady, that the Countess of *Bothwell* was no Rebel,

though her Husband was, and that she had not consented. This was delay'd, *Anno 1596.*

VII. The fourth species or point of Treason is, to stuff the Houses of them who are convict of Treason, and holds them against the King, or that stuffs any of their own Houses in furthering of the King's Rebels, which is expressed also by the former Act: Yet I think this rather exegetick of the former point; then a separat point of Treason, for both these may be comprehended under help *redde* or counsel. *Robert Stewart* was hang'd for keeping out his House against the King: and the Earl of *Orknay* his Father was hang'd for hounding out his Son; the one the 5. of *January*, and the other the 1. of *February*, 1615. And *Cunninghame* of *Tourlands* was forefault and execute for assisting his Brother in keeping out the House of *Cunninghame-head*, 15. *February*, 1601. But yet when Houses are ordained to be rendered (being kept only for privat causes) under pain of Treason, though the party disobey, yet if he thereafter yeeld, that manner of keeping out Houses will not be punished as Treason, but Arbitrarily, as in *Burgies* case, 1668.

The 2. of *February*, 2674. *Macklond* of *Asint* was Pannel'd for having Garrison'd his House of *Arbreak*, and convocating his *Majesties* Liedges, to the number of 400. men, under Pay and Collours. Against which it was alledg'd, that *Asint* here only fortified his Houle, and convocat his men to oppose the Earl of *Seaforth*, but not the King: Nor did he pretend any quarrel against the Government, but against privat oppressions. To which it was answered, that this was expressly Treason by the 6. *Parl. K. Ja. 2. Cap. 14.* whereby it is Statute, that none rebel against the King's Person or Authority: And the House being here Garrison'd to defend against the Sheriff, who was coming to eject in his *Majesties* Name: To resist him, was to resist his *Majesties* Authority, and being Garrison'd in furtherance of Rebels and rebellion, it was Treason by the 25. *Act 6. Parl. K. Ja. 2.* Likeas the Convocation

tion being of about 400. men, or thereby, under the command of Captains, Ensigns, and other Officers. It was likewise Treason by the 75. *Act 9. Parl. 2. M.* and the 5. *Act 1. Parl. Ch. 2.* The Justices did find the Garrisoning of the House not relevant to infer Treason, but only to infer the punishment of deforcement, whereupon the pursuers were forced to alledge of new; that they insisted against him for having Garrison'd his House after the publication of the Letters of Fire and Sword raised at the Pursuers instance against *Asint*, upon which debate they found that the Garrisoning and providing of the House after the publication of the Letters of Fire and Sword, was relevant to infer the punishment of Treason. Likeas they refused to sustain that Article wherein was Libel'd the raising of Men, and the disposing them in Companies under Collours, to be relevant, except it were alledg'd that they were an hundred men or upwards, and were under Collours, or Muster'd, or under weekly or daily pay. And that all this was done after the publication of the Letters of Fire and Sword: both which Interloquutors seem'd surprizing. For as to the first, it seem'd that the Garrisoning of any House against a Sheriff, or any Judge, is to Garrison it against the King's Authority; for a Sheriff doth represent the King in his Authority as much as any Souldier doth. And it is undenyable, that to Garrison Houses against the King's Souldiers, is Treason. Nor can it be denyed but that if this were allowed, no sentence could receive execution in *Scotland*, since every man might Garrison his House, and every man might deny that he Garrison'd his House against the King. And to put in a Garrison, and authorize them to defend the House, was so clearly a War-like action, that there was no place left to debate upon intentions. And though the defending Houses be ordinarily pursued as deforcement, yet the formal Garrisoning of it imports much more. And the commission of Fire and Sword did not add any thing to the Crime committed, in Garrisoning the House: For the design of such Letters is only to warand and command the

Liedges

Liedges to prosecute them as Rebels; So that before the raising of the Letters they were accounted open and notorious Rebels, for Letters of Fire and Sword are only granted against such; and therefore *Assint* in Garrisoning his House to defend such, did expressly commit Treason against the 25. *Act 6. Parl. Ja. 2.*

The second part of the Interloquutor seem'd likewise very hard; for raising men in fear of War, and Lifting them under Colours, or swearing them to Colours, is certainly *exercitum comparare*, though there were no commission of Fire or Sword; for the design of these Letters is not to make a Traitor, but to prosecute actual Rebels. And though this Army was not Levied to oppose immediatly the King's Government, yet even to raise an Army within the Kingdom, though no design could be proved, was Treason, for that was to usurp the King's power: But much more was this Criminal, when the Levy was made, upon the wicked design of opposing the execution of the King's Laws, to see which executed was the chief part of his Kingly Government. And it is clear by the foresaid 17 *Act 6. Parl. Ja. 2.* that it is Treason to make War against the King's Liedges against his forbidding, and if any do, the King is *to gang upon them*, with assistance of the hail Lands, and to punish them after the quality of their trespass.

VIII. The fifth point of Treason is to assail Castles, or places where the King resides, or is for the time, *ibid.* But this must be only understood to be Treason, if the assaulter know the King to be there, or if he be not, upon design to rescue him, *quo casu*, he must be warranted by the Estates, as said is.

IX. The sixth point of Treason is, to raise a fray in the King's Host or Army wilfully, *Ja. 2. Parl. 12. Act 54.* upon which Act the Mr. of *Forbes* was hanged for raising sedition in the King's Host at *Fedburgh*, 14. *July*, 1537.

X. The seventh point of Treason is, to trouble any who kills a declared Traitor, which *Act* extends only to the King, Friends,

Friends, Fortifiers and Maintainers of these who are killed as Traitors; because it is presumeable that when these who are so related trouble the killer, it is presumeable the trouble arises upon that account. 2. These relations are discharged to bear the killers any grudge, or injure them by word or writ. *Nota*, It appears that the reason of this grudge needs not be proved, but is presumed presumption, *juris & de jure*, for here *lex præsumit & disponit super præsumpto*.

XI. The eighth point of Treason is, to impugn the dignity and authority of the three Estates: or to seek and procure the innovation and diminution of their power or authority, *Act 130 Parl. 8. Ja. 6*. But this is to be understood of a direct impugning of their authority, as if one contended that Parliaments were not necessary, or that one of the three Estates may be turned out.

XII. The ninth point of Treason is, to decline the King's Authority, or the Authority of his Council in any case, whether Spiritual or Temporal. And the King's Council are declared to be Judges competent to all causes whatsoever, whether Spiritual or Temporal, of what ever degree or function the defenders who are summoned shall be, *Act 129. Parl. 8. K. Ja. 6*: which Act was made to repress the insolencies of the Ministry, who about that time used constantly to decline the King's Authority in Ecclesiastick matters. Conform to which Act Mr. *Andrew Crichtoun* was sentenced to be hanged and detain'd as Traitor, *Septemb. 1610*. And Mr. *James Guthrie* was execute in *Anno 1662*, for declining the King and his Councils jurisdiction at *Strivling*, when he was challenged for some words spoken in the Pulpit. From this Act it may be observed, that the King is in his own Person Judge competent over all Causes, and all Persons, even though the pursuit be at his own instance, which will appear both from the Rubrick and Statutory part of the Act, albeit *regulariter* no man can be Judge in his own cause.

XIII.

XIII. The tenth point of Treason is, to conceal and not reveal Treason: But concealing in this case is not Treason, except the concealer could have proved it; for else he had by revealing and not proving made himself guilty of Treason. This concealing of Treason is by the *English* Law called misprision of Treason, and is punish'd only by imprisonment during life, forfeiting of goods, and of the profit of Lands during life. For this Crime the Earl of *Morton* was execute by King *James 6.* for having conceal'd the design'd death of King *Henry* his Father: And it may be doubted whether concealing be Treason, where the King is not in a condition to repress or punish the Treason that is intended, for there the end of revealing seems to cease, which is information in order to resistance. It hath been likewise doubted, whether the not revealing Treason was punishable where the Treason was design'd by the Prince or Queen: But since they are likewise Subjects, and may commit Treason, therefore there can be no doubt but it is Treason in any others to conceal their treasonable designs.

XIV. The eleventh point of Treason is, to flee from his Majesty or his Lievtenant, which is not extended only to such as are sworn to Collours, but even to such as are warned to, and do attend the King's Host, *vid. tit. the jurisdiction over Souldiers.*

XV. The twelfth point of Treason is, to deny his Majesties having the only power of calling and dissolving of Parliaments, *Act 3. 1. Parl. Ch. 2.*

XVI. By the common Law it is Treason to kill any of the Princes Counsellors, because they are a part of the Princes own body, *C. quisquis c. h. t.* But with us the pursuing or invading any of the Session, Secret Council, or any of his Majesties Officers for doing his Majesties service, is only punishable by death, but not as Treason, *Act 4. Parl. 16. Ja. 6.* By officers here are meant only Officers of State, else it might be extended to Messengers. And I heard it resolved that this Act

extended

extended not to such as invaded the Lyon. And these words, *Any of the Session*, are not extended to Advocats, Clerks, Macers, or any else besides the Lords, as is clear by the narrative of the Act. But I think the quality adjected that they were invaded for doing his *Majesties* service, may be proved by circumstances and presumptions, as if a pursuer who had lost a Cause, should invade the next day a Lord who had voted against him. And the words, *This being verified and tryed*, import so much. But the *Stat. Edward. 3.* is much more clear, making it Treason to kill the Officers therein mentioned only, *viz.* Chancellor, Thesaurer, chief Justice of either Bench, or any Judge of either Bench sitting in Judgement only; and from this Statute of our Neighbouring Nation, we may argue that the killing none below a Lord of Session should inter the punishment of this Act. The killing a Member of Parliament is not in *England* Treason, though the Parliament be a higher Judicatory then any express in the Act. And *Cook* tells us that they allow not *argumentum à fortiori* to inter Crimes. And with us the killing a Member of Parliament would not infer death by this Act, since they fall under no qualification therein specified. In *England* killing Officers falls only under the Statute, but with us, *invading or pursuing them* is death, though it take no effect. *Quaritur*, If to invade them when they are out of the Kingdom would fall under the Statute, since they are not under that character elsewhere. Or if he who invaded them during their being suspended, would fall under this Act, since during that time they retained the character, and the exercise is only suspended. And it is resolved by the Doctors that a Statute punishing such as invade Magistrats, is only to be extended to such Magistrats as are once admitted, but not to such as are only named or elected; for such Statutes are extended *in gratiosis*, yet they are restricted in such odious points as this, *Cabal. cas. 148.*

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Treasonable words, vid. t. Injuries and Libells.

XVII, The third branch of the division is Statutory Treason, which comprehends under it several other points of Treason, which because they relate to other Crimes, therefore I shall also refer the Reader to these Titles wherein these Crimes are principally treated of. But it will appear by these Acts, that these Crimes are not declared to be Treason, but only to be punishable as Treason, and therefore these Statutory Treasons have not at all the other privileges competent to Treason, as that they may be proved by Women, & *alios testes inhabiles*, or that he who accuses in these will commit Treason, if he prove not his accusation. Thus wilful Fire raising is Treason, *Fa. 5. Parl. 3. cap. ultimo*. Theft in Landed-men is Treason, *Fa. 6. Parl. 11. cap. 50. vid. tit.* Theft, Murder under trust is treason, *Fa. 6. Parl. 11. cap. 51. vid. tit.* Murder, slayers of Mass, Jesuits, trafficking Papists and their resettlers, commit Treason, *Fa. 6. Parl. 12. cap. 120. vid. tit. Heresie*. To buy or bring home poyson, is treason, *Fa. 2. Parl. 7. c. 31. vid. Poyson*. Thieves who take leill men upon Bond to re-enter them, commit treason, *Fa. 6. Parl. 1. cap. 21*. But though this Act speaks generally of the taking of any *Scottish-man*, yet it may clearly appear by the narrative, and the whole strain of the Act, that the same strikes only against such Thieves as kept correspondence with the *English*, and took *Scottish-men* prisoners into *England*. But custom hath interpret this otherwise, for *Duncan Macgrigor* was 15. July, 1643. convict and hang'd as a traitor, for aite and part of taking *James Anderson* and *John Mackie*, and the taking of Caprain *Cairns* found relevant as an Article of Treason against *Affint*.

To usurp any Prelats place after his decease, is likewise treason, *Fa. 5. Parl. 7. cap. 125*.

XVIII. This Crime hath in it many specialities, wherein it differs from other Crimes: As first, He who accuses any man for treason, doth incur the pain of treason, if the defenders be acquit, which is occasioned (as the Act bears) because

of the odiousness of treason. But since the the Act sayes expressly that this shall take place where *the party calumniat is called, accused, and quit of the Crime of Treason*; therefore it may be infered, that though the pursuer raise Summonds of treason, and should pass from the same before the Pannel go to the knowledge of an Inquest, that *eo casu*, though the pursuer might be punished *pœna extraordinaria*, yet he could not be punished as a traitor. It may be likewise doubted, if this holds in Statutory Treason, as Theft in Landed men, &c. And since the reason inductive of that Act is the odiousness of treason, it would appear that this rigid Law should not take place in these points of treason, which are not so odious of their own nature.

Another speciality in treason is, that it can only be tryed by the Justices, *Reg. Maj. lib. 1. c. 1. v. 1.* and that because of the Kings immediat interest, since it is not presumable that the Fiscal in Interiour Courts would be as careful as his *Majesties* Advocat, who cannot appear there, and because of the intricacies and great consequence of that Crime: but it may be doubted whether Lords of Regality, or Subjects having a Justiciary, are Judges competent to Treason, and it seems not, for the reasons foresaid.

XIX. The second priviledge of treason is, that those who are pursued for treason should be immediatly committed to prison, and their goods should be put under sicker Burrows, *id est* Caution, under which they must remain ay and while they suffer an Assize, *Fa. 2. p. 12. c. 49.* and *Reg. Maj. lib. 4. c. 1.* But it seems very hard in our Law, that there is no time prescribed for the pursuer to insist, but that the person suspect may be kept in prison for a long time, though he be very innocent, and offer himself to a tryal; whereby the most innocent of Subjects may be ruined in their Fortunes and Families, without any just cause. And yet upon the other hand, it were hard that Traitors should be allow'd to go abroad, because probation cannot be presently had, which it may be the traitor hath abstracted, or that the King or State should be forc'd to discover too soon by a pursuit, a treason, which he is bound in

policy to cover for some time. And as in War, so in Treason (which is as dangerous) many things are allow'd to be done which are not otherwise regular, the interest of all preponderating the interest of any one, or a few.

XX. The third speciality in treason, is, that all Charges of treason should be execute by Heraulds and Pursevants, bearing Coats of Arms, and by Macers, and that for the greater solemnity, else these Charges are declared null, *Fe. 6. p. 12. c. 125.* Likeas, the ordinary custome is to execute Summonds of treason after that manner. But it was found upon the 5. of December 1666. in the Action intented at his Majesties Advocats instance against *Mackulloch* and others, that this Act did only relate to Summonds of treason, or any other Charges, wherein men are ordain'd to obey, under pain of Treason. But that inditements of treason given to men who are in prison, may be execute by ordinary Messengers: And yet the Act sayes, that all Executions given otherwise then is appointed by that Act, shall be null.

XXI. Women, and others, may be Witnesses in this Crime, though in other Crimes they cannot: and one Witness is sufficient here, and *famosi & impuberes* of what ever age, are receivable as Witnesses, by an expresse Act of the Sederunt of Lords of Session, in *Anno 1591.* Likeas, *Cod. fab. hoc tit. def. 4.* sayes, *est privilegium criminis Lase Majestatis ut facilius probetur.* And that it may be proved *per famosos & socios criminis.* And that it was decided in *Savoy, 1591. vid. Pappon. lib. 24. tit. 2.* But the *English* do most justly conclude, that because the punishment is severe in treason, therefore it ought to be proved by manifest and direct proof, and not by presumptions, or strains of wit, *Cook pag. 12.* And that two witnesses are necessary for proving treason, he proves most learnedly, *pag. 26.*

By the Civil Law, *famosi, & mulieres* were admitted to accuse in this Crime, though not in any other Crime, *l. 7. and 8. ff. ad l. jul. maj.* But this last priviledge should only hold

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in Perduellion, *Mascard. de prob. lib. 1. conclu. 462.* and not in Statutory Treason. And that this should hold in no species of treason, was *Math.* opinion, *pa. 372.* because *per l. ult. cod. de prob. in capitalibus causis Idonitis testibus atque apertissimis documentis opus esse dicitur nec excipitur crimen Majestatis.* Neither doth it follow, that because persons who are not admitted in other Crimes; are admitted to be accusers in this, that therefore these who are unfit to be Witnesses in other Crimes, should be admitted in this: for there is little hazard in an unfit accuser, but there is great hazard in unfit Witnesses. And this I think much more suitable to reason than the former Statute; for the greater the hazard is, the probation should be so much the clearer. And though *testes inhabiles* may be received, or one Witness may prove sufficiently for subjecting the Pannel to the torture, (which is all that can be infer'd from that Act of *Sederunt*, which sayes only that they ought to be received Witnesses, but sayes not, that they ought to be received in all cases). Yet it were against all reason that any condemnatory verdict or sentence could be founded upon such probation.

I find also by the Law of *Savoy*, that *socii criminis*, & *famuli*, are admitted to be Witnesses; not in treason generally, but in Perduellion. And that Act is by their Lawyers restricted so, that the Pannel cannot be condemned to death or forfeiture upon such depositions, but only to torture: Nor will he be tortured upon such depositions, except the deponent be upon Oath, and abide the torture also at his deposition, *Cod. fab. lib. 9. tit. 5.* All which seems most reasonable, but yet it seems that no man is to be repute *socius criminis*, but he who is convicted, or hath confess'd the Crime, and dilates others; for else a man being accused for treason, cannot alledge that the Witnesses led against him were *socii criminis*; for that were to confess himself to be guilty: for no man can be *socius criminis* to the Pannel, except the Pannel be guilty himself, and was *socius* to the witness therein *nam relata se mutuo ponunt.* And this was

was so found in *Affint's* Process, but it was there alledg'd, that though *socius criminis* could not be received for the Pannel, yet he could be received against him. And that was the sense of the Doctors, who exclude *socius criminis* from being a witness in treason. But as to this, I doubt very much, for if a person confessed his accession, it seems unjust that he could condemn others, being infamous himself. And yet in open treasons, as rising in Arms, it seems necessary to receive such as were in Arms; for none else can come near an Army of Rebels, and so the Crime must be proved by these, or by none.

XXII. The fifth privilege is, that treason is not extinguish'd by death in all cases, as other Crimes are. But that treason committed against the Kings Person, or Common-wealth, may be inquired into after death, and the committers Heir may be forefault therefore, *fa. 5. p. 6. c. 69.* which Act bearing to be founded upon the Civil Law, these general words contained in it, *against the Kings Person, or Common-weal,* must only be extended against such treasons, as were by the Civil Law accounted Perduellion: And therefore it is most necessary to know the Civil Law in this case, and what was therein called Perduellion. Seing albeit all treasons may by a natural interpretation be said to be committed against the Kings Person, or Common-wealth, yet the Civil Law declared only that species of the Crime of treason, which they called Perduellion to be punishable after death, *l. ult. ff. ad l. jul. Maj. plane non quisquis legis juliae Majestatis reus, est in eadem conditione: Sed qui Perduellionis reus est, hostili animo adversus rem publicam, vel principem animatus.* So that the intallible mark of Perduellion is *hostilis animus*, a design of raising Arms. And therefore we may conclude that not only Statutory Treasons are extinguished by death, but that even simple concealing, and not revealing, or a malicious design to poyson the King, and such other treasons as shew not a desire of rising in Arms, are likewise extinguish'd by death. And yet the *Basil. l. 12.*

b. t. say, that all the heads of treason are extinguish'd by death, *excepto capite proditoris, & insidiarum contra principem,* χωρίς τῆ περι καθοριστικῆς ἀπὸ τῆ κεφαλῆς τῆς προδοτικῆς καὶ τῆς κατὰ βασιλέως ἐπιβουλῆς.

Albeit the bones of the Defunct Traitor are ordinarily taken up, and brought to the Pannel in pursuits of this nature, as was done in the forefaultur of the Laird of *Restalrig*; yet this is not necessary, but it is necessary in pursuits of this nature, that the Defuncts nearest of Kin be called, as Defenders, for their interest; both because their Estates are to be taken from them by their forefaultur, and to the end they may defend the Defunct, and object both against the relevancy of the Libell, and the hability of the Witnesses: And therefore the *Basilicks* add very well, that *hereditas publicatur, nisi crimen ab heredibus purgetur*, εἰ μὴ καθαρῶσθαι ἀπὸ τοῦ κληρονομήσαντος.

It may be doubted, whether since the forefaulting after death, is founded upon the Civil Law, and that the former Act bears expressly, that these pursuits may be intended conform to the common Law, if these pursuits should not prescribe with us in five years, as they do by the common Law: and it would appear they should, since these pursuits are intended conform to the common Law, and *quem sequitur commodum eum d. bet sequi incommodum*.

The sixth priviledge of Treason is, that the Kings Advocats is to be the last Speaker to the Assize in Perduellion, though in other cases the Pannel's Advocats are to be last Speakers; And the last Speaker has much advantage, for he may answer all is alledg'd by the opponent, *Art. 11. Regulations 1670.*

XXIII. The last priviledge of Treason is, that albeit of old no persons could be condemned in absence by the Justices; yet the Parliament still could have proceeded against Traitors in absence. And now by a late Act of Parliament, it is found, that in the case of Perduellion, and of treasonable rising in Arms against the Kings Authority, the Justices may proceed to the receiving of probation, and pronouncing of sentence

even in absence of the Party: Which being first propounded as a Querie to the Council, they remitted the same to the Session, to whom his *Majesties* Advocat gave in the following Reasons, and Queries, upon the 15. *August* 1667. Whether or not a person guilty of high Treason may be pursued before the Justices, albeit they be absent and contumacious? So that the Justice upon citation, and sufficient probation and evidence, may pronounce Sentence and Doom of forefaultur, if the Ditty be proved. The reason of scruple is, that Processes of forefaultur are not so frequent; and that in other ordinary Crimes, the defenders, if they do not appear, are declared Fugitives, and that the following reasons appears to be strong and relevant for the affirmative, 1. By the common Law, albeit a party absent cannot be condemned for a Crime, yet in Treason which is *crimen exceptum*: This is a speciality, that absents may be proceeded against, and sentenced. 2. By the first Act of King *James* the 5th, his 6. Parliament, it is declared, that the King hath good cause and action to pursue all Summonds of Treason committed against his Person and Common-wealth, conform to the common Law, and good equity and reason, notwithstanding there be no special Law, Act, or provision made thereupon. And therefore seeing by the common Law, persons guilty of Læse Majestie may be proceeded against, and sentenc'd, though they be absent. It appears that there is the same reason why the Justices should proceed against, and sentence persons guilty of Treason, though absent, and that he is sufficiently warranted by the said Act so to do. 3. It is inconsistent with Law, Equity and Reason, that a person guilty of Treason should be in a better case, and his *Majesty* in a worse, by the contumacy of a Traitor, the same being an addition (if any can be added) to so high a Crime; and that he should have impunity, and his *Majesty* prejudged of the casualty arising to him by his forefaultur. 4. The Parliament is in use to proceed and pronounce doom of forefaultur, though the party be absent: and in so doing they do not proceed in and by a legis-

a legislative power, but as the Supreme Judges: and the Parliament being the fountain of Justice, what is just before them, is just and warrantable before other Judicatories in the like cases. 5. By the above-mentioned Act of Parliament, it is Statute, that Summonds and Procefs of Treason may be intended and pursued after the death of the Delinquents, either his Memory, or Estate, delating the one, and forfaulting the other, whereupon sentence may follow to the effect fore-said. And therefore, seeing sentence may follow when the Delinquent cannot be present, and is not in being, it were against all reason, that when they are wilfully and contumaciously absent, they should not be proceeded against, and sentenced, if they be guilty. And it were unjust that his Majesty should call a Parliament for punishing and forfaulting of persons, being absent, or that he should wait till they die; especially seeing in the *interim* the probation may perish, by decease of the Witnesses.

Follows the Lords of Session their opinion, *Edinburgh*,
the 26. of February, 1667.

The Lords of Council and Session having considered the Queries above-written, presented to them by the Lord Bellenden his Majesties Thesaurer Depute, it was their opinion, that upon the Justices citation, and sufficient probation taken before them, the Judge and Assize may proceed and pronounce sentence thereintil, and forfault against the persons guilty of high Treason, though they be absent and contumacious.

Sic subscribitur Jo. Gilmore I. P. D.

Upon this the Parliament ratified the Proceffes led against these persons: and by the 11. *Act Parl. 2. Ch. 2. Sess. 1.* it is Statuted, that rising in Arms against the Kings Authority, might be pursued before, and judged by the Justices. But the Parliament retain still a power cumulative with the Justices; and when Proceffes of Treason are intended before them, they

may proceed as formerly, and thought this last Act a great innovation of all our Law. Nor is it imaginable but that if it had been safe, that that privilege would had been granted to his Majesty formerly: And that it is contrary to the Civil Law, is clear, *per l. 1. & l. penult ff: de requirendis reis, nam annotabantur bona, & si reus post annum non comparuerit, & satis dederit de stando; non recuperabit bona, non tamen de delicto habetur pro confesso. Divi fratres rescripserunt, l. 1. ne quis absens puniatur, & hoc jure utimur, ne absens damnetur.* And that no probation can be received against absents in Treason, is clear by *Matheus hoc tit.* and albeit *per extrav. constitutionem Hen. 7.* It is ordained, that probation may be received in absence, yet this is reputed no part of the Civil Law, and is followed by no Nation, and by that extravagant constitution this privilege is allowed to all species of Treason, which we find to be unjust: And albeit Treason may be in some cases punished after death, yet it cannot be from that inferred, that it may be punished in absence, since after death the malice of unjust pursuers ordinarily ceases, and the hazard of Death is then over: so that the event of the pursuit is not so terrible, nor dangerous. And in these Processes, the nearest of Kin are called, who may propound against both relevancy and probation, whatever was competent to the Defunct. Whereas when a person is pursued in absence for Treason, no man can in our Law be admitted to propound any thing in his defence. And albeit it seem unreasonable that a person guilty of Treason should be in a better condition by his contumacy, than if he appeared, To this it may be answered, that this would prove too much, for this absurdity may be as well press'd in absents for all other Crimes; and against such as are absents in all the several indite-ments of Treason; and yet the Justices are never allow'd even by the late Act to proceed to sentence against any, but such as are pursued for rising in Arms against the King. But the true answer to this seeming absurdity, is, that the Law is not so inhumane, as to punish equally presum'd and real guilt: what

what may be a Crime, as what is found one. And it hath been oft found, that men have been absent, rather out of fear of a prevailing Faction, or corrupt Witnesses, or by inadvertence, or not being truly cited, or by being violently detained, then out of a consciousness of guilt; yet since so judicious a person proposed this overture, and since Council, Session, and Parliament have fortified it by their Authority, I submit my judgment to their determinations.

XXIV. It is ordinary for his *Majesty*, to command, or forbid, by privat warrands, under all highest pains, or as you shall be answerable to us. And the certificat on here being indefinite, it may be doubted what the punishment may be, in case of contravention. And 1. It would appear that the contraveeners cannot be punish'd as guilty of Treason, for only Laws can make Traitors in this Kingdom. 2. It seems that this being a contempt of the chief and Supreme Magistrat, it may be punish'd arbitrarily; if the command be lawful, and in case of importance, since even inferiour Judges may punish such as contempt or disobey them, in what is necessary for their jurisdiction. Likeas Lawyers are of opinion, that *in obediens precepto superioris sub pana indignationis, est arbitrarie puniendus, Cabal. casu 30. Bald. in l. legis virtus, ff. de legib. Menoch. cas. 365.* But in that case, they determine that the arbitrary punishment cannot extend to death. And though some Doctors are of opinion, that commissions are to be punish'd in this case more severely then omissions, yet I conceive some omissions may infer greater contempt, and be more dangerous then commissions. Nor allow I the distinction used by *Lucas de penna, ad l. 1. C. ut dignit. ord. servet.* who sayes, that if the contempt be of dangerous consequence, as if one being commanded to take care of a Castle, or to stop the passage of an enemy, that then the contempt is to be severely punish'd by death: but if the contempt be of things indifferent, or mean, then the contempt is only punishable arbitrarily. And yet he is too severe in making it to be punishable by death, except the person

commanded were a Souldier, or one who were obliged by acception of his Office to obey under that peril. And therefore I would rather distinguish betwixt such commands as use to be punish'd by death, if contemn'd, such as Military commands; and in these, the contempt may be punish'd by death, for Custom comes in place of Law, & *sibi imputet*, who hath undertaken such an employment as requires such obedience. But if the King should command any Country Gentle-man, or Lawyer, to fortifie, or keep a Castle under all highest pains, it is probable, that their omission could not be punish'd by death, and is only punishable by losing of the Princes favour, & *quod Princeps non exhibebit se gratiosum*: which *Bartol.* makes the punishment of that disobedience in all cases, *ad extrav. qui sunt rebelles*.

XXV. The punishment of Læse Majestie was death, *l. 5. C. h. t. anima omisio*, as *Justinian* calls it in his Institutions, together with the Confiscation of all his Estate that lyes within the Territories of him against whom the Treason is committed; but is not extended to his Estate lying else-where, *C. 2. de constil. in 6*. So that if a man commit Treason against the King of *Britain*, his Estate in *France* does not forfeit.

With us the punishment of Treason is death, and Confiscation likewise of all the Traitors Estate, whether Heretable, or Moveable, Feudal, or Allodial. And the solemnity used in Parliament at the pronouncing of such sentences are, that the Pannel receives his sentence kneeling, and that after the Doom of the forefaulter is pronounced against him, the Lyon and his Brethren Heralds come in in their formalities, and tear his Coat of Arms at the Throne, and thereafter hang up his Execution revers'd upon the Cross: Which had its rise from the old *Roman* customs, for as *Tacit.* observes, *lib. 5. deterere omnes à simili culpa volebant, non pœna modò, sed ignominia metu, ut nomen è fastis deleteretur, & effigies tolleretur*. Which is likewise clear, *l. 24. ff. de pœnis*. And that this is the custom of *Flanders* is clear by *Perez. h. t. moribus nostris insignia gentilia*

gentilis delentur, & destruantur. But this I think should only hold in the Crime of Perduellion, but not in other Treasons, *Perez. ibid. num. 19.*

Another speciality introduced in the punishment of Perduellion, by the common Law, was, that *memoria damnabatur*, and that his Children were declared incapable to buik any Estate or Office; which the Emperours *Arcadius* and *Honorius*, l. 5. c. ad l. *Ful. Maj.* calls a mitigation of the punishment due to Children, who as they say should have died for their Fathers Crime. But this is so unjust, that no Nation doth now use it, as *Mathews* observes, p. 352. And it is expressly against l. *Crimen ff. de pœnis*, and the Scripture, *Deut. Chap. 24. Vers. 16.* And the opinion of *Plato*, lib. 9. *de legibus.* And therefore *Amazias* 2 *King. 14. 5, 6.* would not kill such as were the Children of those who kill'd his Father, because (as is express'd there) *The Father shall not be put to death for the Children, nor the Children for the Fathers.* And *Achan's* punishment, *Joshua 7. 14.* wherein he and his sons and his daughters were stoned to death, and burned for his own Crime is no concluding argument against this opinion, since that was founded expressly upon Gods revealed will, who can dispense with, or alter the Laws of Nature: but it is very probable that the reason of that severe sentence was, that God knew the whole Family to be involved in the guilt. And it is very probable that they were refetters of the theft, or conscious to it, since the stolen goods were taken out of the Tent were they were. And I remember that our Parliament in *Anno 1661.* having adjected to the Marquis of *Argyles* Sentence the dishabilitation of his Children, his Majesty did expressly command it to be rescinded in the last Session of that Parliament; in which the Children were rendered capable to buik Estates or Honours, as the other Subjects were. I know it is the opinion of some Lawyers, such as *Budeus*, that this l. 5. was thereafter abrogat, *Sanctus C. de pœnis*, which by his calculation is two years alter the other. And though *Mathews* thinks that l. *San-*

cimus

cimus is only introduced in favours of the Friends, but not of the Children: Yet it is more just to think that by this Law the former was abrogat, even *quo ad* Children, since the reason given in that Law is general, *Sancimus ibi esse pœnam ubi & noxia est propinquos, notos, familiares procul à calumnia submovemus quos reos sceleris societas non facit. Nec enim ad finitas, vel amicitia nefarium crimen admittunt. Peccata igitur suos teneant auctores: nec ulterius progrediatur metus, quam reperiatur delictum. Hoc singulis quibusque iudicibus intimetur.* Nor can it be concluded, that it is clear that the former Law was not abrogat by that Law, since *l. pen. C. Theod. de bon. proscrip.* the same Emperour *Honorius* leaves no Estate to the Children of Traitors; for it does not follow, that because they are to succeed to no Estate of the Traitors, that therefore they should be incapable to gain, or to succeed to any other Estate. But after all these Laws the *Basil. l. 5. h. t.* extends the punishment, *κατὰ τὸν πατέρα.*

Another punishment of Perduellion by the Canon Law, *cap. felicitis de panis* in 6. is, that the Traitors House shall be thrown down, and not re-built, which is not in observance amongst us. Nor was it lawful to mourn for him when dead, or to give him a publick Burial, *l. 11. ff. de his qui not. & l. 35. ff. de relig.* And with us it is ordinary for the friends of such as are condemned for Treason, to get a warrand for attending them in mourning upon the Scaffold. But I do not find that the attending him in mourning, or the burying him, was ever accounted a Crime in Scotland.

I find that some Lawyers believe, that the fear of losing an Estate excuses him who has complied with the Enemies of his Prince, *note ad Clar. h. t. num. 9. Imol. Consil. 34.* But this was expressly repelled in the Marquiss of *Argyle's* Process 1661. But certainly the fear of life might excuse; for there can be no Crime where there is not a voluntar act, and nothing can be voluntar which is forc'd.

Though repentance is no relevant defence against a ditty of Treason,

Treason, especially where there is once a deed of Treason committed; yet such is the clemency of Princes, that by the *L. 1. Basil. h. s.* I find that he who in the beginning of a conspiracy reveals, is to be rewarded, but he who after the Treason is committed reveals the Authors, *μετά το πρᾶγμα*, is only to be pardoned.

Sometimes likewise to punish the atrociousness of this Crime, the very Parents are banish'd, and all the Family are ordain'd to change their name; as was done *Ravillac's* case by the Parliament of *Paris*: for though these could not be corporeally punish'd, yet the State may justly deny their protection, and Country, to any who may be presum'd will bear revenge, or probably were infected with their Friends Crime.

But though these punishments may be inflicted after probation, yet if the Pannel was only denounced for not appearing in Treason, he only loses his Moveables; and a gift of forfeiture following such a denunciation was declared null by the Lords of Session, because the certification of the Letters in that case, is only to be denounced fugitives, and lose their Moveables, *30. July, 1662. and 30. Novemb. 1671. Haige contra Moscrop.*

TITLE

TITLE VII.

Sedition.

1. *What is Sedition?*
2. *The punishment of it.*
3. *Convocation of the Liedges how punished.*

I. **S**edition is a Commotion of the people without authority, and if it be such as tends to the disturbing of the Government, *ad exitium principis vel Senatorum ejus & mutationem rei publicæ*, it is Treason; but if it only be raised upon any privat account, it is not properly called Treason: But it is with us called a Convocation of the Liedges,

These publick Seditions are called *Seditio regni vel exercitus*, cap. 1. l. 4. *Reg. Majest.* And this species of Sedition is punishable as Treason: And the Mr. of *Forbes* was hang'd for raising Sedition in the King's Host at *Fedburgh*. When a Sedition is raised against the Government, it is repute Treason by the Doctors, as is clear by *Bossius de crimine Laesæ Majestatis*: And *Perezinus hoc. tit.*

II. Albeit per l. 1. *cod. de seditiosis*, it be only said, *multam gravissimam subitinebit*, which general term, in my opinion, is used to signifie that this Crime is not to be equally punished, but according to the severall degrees of guilt, and the authors and first raisers of the tumult are to be most severely punished. And the *Basilick* sayes only that *gravissima pena subijcitur βαρυτάτη υποκειται τιμωρία*, which the Greek glots expounds unwarrantably to be *ultimum suplicium* in all cases, and as to raise men against the Prince is Treason, so to raise them against Publick Order or Discipline, *κατα τὴν κοινὴν εὐταξίαν* is Sedition properly, and thus Treason and Sedition properly differ,

differ, though oftentimes Sedition may be accompanied with qualities which may raise it to Treason. And this the *Basilicks* make not *seditiosus conventus* Treason, but if it be rais'd *ut occidatur Magistratus seditiosus conventus*, it is Treason in that case, *l. 1. h. t.*

I find not Sedition to be expressly declared Treason with us in any case; for by the 78. *Act Fa. 2. Parl. 14. the raising of Commons in hindering the common Law* (which is properly Sedition) or the making of Leagues and Bonds within Burgh, without the command of their Head Officer, is declared to be punishable by Confiscation of Moveables, and that their lives shall be in the King's will. From which Act it is likewise to be observed, that the command of the Magistrate doth in things belonging to his Office excuse the Liedges, and therefore it may be asserted that the Liedges rising in obedience to commands of the Sheriff, or Lord of Regality, are not punishable, except it was clearly palpable to them that their insurrection was in contempt of his *Majesties* Authority, which appears to be the meaning of the foresaid *l. si quis contra evidētissimam jussionem, &c.* And seeing the Liedges are obliged to obey their Magistrats, and to rise when he calls them, as is evident by many Acts of Parliament, and without this allowance his *Majesty* could not be served: it were hard to punish them for that obedience, which would be punishable if they refused it.

III. The convocating the Liedges in Bands of Men of War, for daily, or monethly wages, without special licence, is declared likewise to be punishable by death, by the 75. *Act 9. Parl. 2. M.* which Act is ratified by the 12. *Act 10. Parl. K. Fa. 6.* And the making of all Leagues and Bands amongst the Liedges without his *Majesties* consent, are discharged, and the contraveeners are declared to be punishable as movers of Sedition and unquietness, to the trouble of the publick peace of the Realm, therefore to be punished with all rigour, to the example of others. Both which Acts are ratified by the 4. *Act*

1. *Ses. Charl.* 2. And yet it may be contended that such Seditions as these are punishable as Treason, since the making of Bonds and Leagues amongst the Liedges is declared by the foresaid 4. Act to be one of his *Majesties* Royal Prerogatives. And sure it is Treason for any of his *Majesties* Liedges to usurp his royal prerogative. But sure it is, that to convocat the Liedges simply without Bonds or Leagues, can no wayes be accounted Treason, much less the being present at such Convocations, though in Arms. And thus it was found in the case of a Baxter who was pursued as guilty of the Convocation raised against the Customers in *Anno 1665*. That naked assistance at such meetings *per se* was not relevant to infer death, but only an arbitrary punishment, as is clear by the 5. *Act 1. Parl. Ja. 1.* whereby all men are forbidden to travel with more nor they can sustain, and if they do, they may be put under sicker Burrows till the King declare his will. And by the 85. *Act 6. Parl. J. 1.* Electing of Deacons was discharged as Sedition.

Convocations are allowed in some cases, as for pursuing of Thieves and Sorners, as *Ja. 6. Parl. 14. cap. 247.*

This Crime of simple Convocation is ordinarily pursued before the Council, and is seldome punished either by the Council, or Justice Court, *tanquam crimen per se*, but as the agradding quality of a Riot or other Crime.

TITLE VIII.

Poyson.

1. *The punishment of Poyson by our Law.*
2. *How far the giving good Druggs irregularly is punishable.*
3. *Whether the poysoning Jews, or Excommunicat Persons, be punishable.*
4. *Whether the poysoning Beasts, or Fields, be punishable by this Statute.*
5. *Whether endeavours to poyson be punishable.*
6. *The aggravations of this Crime.*

I. **P**Oyson is by our Law declared to be punishable as the Crime of Treason, but it is not declared Treason, *Act 31. 7. Parl. Fa. 2.* By which all persons are discharged to bring home Poyson for any use by which any Christian man or woman may take bodily harm, and that under the pain of Treason, and that being convict, they shall forfeit to the King Life, Land, and Goods; but notwithstanding of these words, *for any manner or use*, Apothecaries and others do daily bring home Poyson. But to this it may be answer'd, that they bring the same home, not as Poyson, but as Druggs, and the Law presumes that the Liedges are in no hazard of that Poyson which is in the hands of skillful men. This was likewise the opinion of the Doctors *Gothofred prax. criminal. S. venenum*: But notwithstanding that the buying or giving of Poyson is declared Treason by the Law, yet I find no instances in the Journal Books where any have been convict as Traitors upon this account: But on the contrary, *John Dick* for poysoning his Brother and Sister is only ordained to be execute,

but is not forefault, *ult. March 1649*. If any Stranger bring home Poyson any manner of way, it is provided by the 32. Act of that Parliament, that they shall be punished the same manner of way, and that no remission or safe conduct shall be profitable to them.

The reason of this severity proceeds from the abominableness of that Crime, *plus est enim hominem veneno necare quam gladio dicit gloss. in S. ead. lege just. de publicis iudiciis per textum l. 1. de mal. & Math.* For he to whom Poyson is given cannot defend himself, and Poyson is a way of death so much hated, that though the Law hath allowed executions by the Sword, yet it hath never allowed any execution by Poyson.

Those who give Poyson were by the Civil Law called *venenarii*; and they were only punished capitally, *per l. Corneliam de sicariis, l. 1. S. 1. ad l. Cornel. de sic.* And it may be proved by presumptions, *Clarus Quest. 4. vers. fin.* But the Body must in this case be sighted by Physitians, and the poysonous quality must be proved.

The buying of Poyson, though with a design to kill thereby, if murder do not actually ensue, is not thought capital by the Doctors, but only punishable *pena extraordinaria*, *Gothofred. prax. criminal. S. venenum num. 21.* Yet with us the very buying is by this Act of Parliament capital.

II. Whether to give Druggs that are not of their own nature poysonable too frequently; and contrary to the nature of the disease, be punishable by this Law, or as murder, or be punishable at all, was debated in *Kennedies* case, the 8. of February 1676. and that it was punishable was contended, because *venenum* or *pharmacum* was in Law *vomen generis*, and exprest good Druggs as well as ill, *l. venenum ff. de verb. sig.* And the best of Druggs, given in great excess, is Poyson; for Poyson consists in excess of quantity as well as quality, and whatever overpowers our nature is poysonable to us. And since the one may kill as well as the other, and that killing is that which is punish'd, the Law should punish the one as well as the other.

And

And whatever may be said where the design was not known, yet here the design of killing was communicated to *Kennedie*. And it is proved that he refused to give meer poyson, lest the external marks after death should discover that Poyson was given, but that it was safer to give constant purgations to be thrown in by his Servant in his drink upon all occasions, and that without his knowledge, and contrary to the nature of his disease, he having a Flux: All which circumstances shew a design to kill. And *Gothofred. S. venenum* is clear that *medici & farmacopola ineptum medicamentum scienter ad hibentes in infirmis morietur tenentur ut homicida*. And though the Judgement of Physicians ought to be ask'd where the design is not known, yet where the design of killing, and means suitable to that design are clearly proved, there is no place for consulting Physicians; nor can any danger ensue from the preparative of punishing this Pannel to other Physicians or Apothecaries, except they give Physick without being employed by the party, and at the desire of Servants, who imploy upon a design to kill, and administrat the Druggs at unseasonable hours: All which are of themselves Criminal; and this way is more dangerous then ordinary Poyson, because Servants are more easily admitted then others, and this way is less discoverable. Nor needs it be proved that the Defunct died of this Poyson, for even one who got true Poyson might have died of other diseases, but it is sufficiently proved, that after the giving of thir Purgatives, he died the next morning of such a looseness as made his Bed to swim. And as this is like the natural product, so *presumitur contra versantem in illicito*, especially all this design of Murder being to conceal the Servants theft, in which this Apothecary was a sharer.

III. From these words of the Act, *through the which any Christian man or woman may take bodily harm*; it may be concluded, that 1. The poysoning of a Jew or Pagan falls not under this Act, though it may be pursued as Murder: And it may be doubted whether the poysoning of an Excommunicat

cat person can fall under this Act, since they are not Christians: But to prevent all this, the *English* Statute bears, that to kill any reasonable creature *in rerum natura*, by Poyson, or otherwayes, &c. And *Cook* observes, that to poyson a Jew or Turk falls under their Statute.

IV. From these words likewise it may be observed that the poysoning of bruit Beasts does not fall immediatly under this Act, nor yet the poysoning whole Fields, to the end Beasts may die. Albeit both these Crimes be punishable by death by the Laws of other Nations, as *Carpz.* observes, *tract. crim. Quest. 21. num. 24.* And since Theft is punishable by death, much more ought the poysoning of Beasts be, since not only is the party les'd by wanting his Beasts as much as in Theft, but the Common-wealth is more prejudg'd then in Theft, since the Beasts so poyson'd, are made unserviceable as to all uses; and men are likewise in danger by eating or using of them: And this is worse then houghing of Oxen, which is capital by our Law.

But if a Beast be poyson'd, that men may be thereby poyson'd, then the poysoning of Beasts will infer death.

From these words, *may take bodily harm*, it may be infer'd likewise that the giving of Poyson whereby men do fall Paralitick, or Lame, should fall under this Statute, though the person dies not, since that may be constructed bodily harm.

V. As also it may be concluded, that since to bring home Poyson whereby men may die does infer death, that therefore the giving of Poyson, though death do not follow, either because the Poyson was not strong enough, or because the party poisoned did counter-act its force immediatly by suitable remedies, should be punishable by death; for these are more immediat deeds then to bring home Poyson: And generally indeavour is in this Crime punish'd as the consumat Act, when the indeavour comes to any deed that approaches the Crime *l. 1. ff. ad l. Pomp. de parricid.* though *Carpz.* is of a contrary opinion, asserting that *conatus* or indeavour is only to be punish'd

punished even in that case by an extraordinary punishment. The administering Drinks or Medicaments to procure or increase love, is thought not punishable, though death do not follow, because there was no design there to kill, *Carpz. ibid. & l. si quis ff. de pœnis*, though this be punishable, as that Law asserts, by a lesser punishment, *nam est res mali exempli*.

VI. Indeavour is punishable in the poysoning of Parents, and in reiterated indeavours, though death follow not. And the poysoning of Magistrats, or Masters, since these great aggravations are so odious in the very contrivance, that these aggravations are as odious as success: And as the Judge may mitigate the punishment upon the account of lessening circumstances, so he may heighten the punishment upon the account of aggravating circumstances, *Vasq. contraver. illust. cap. 14. and Carpz. num. 50. quest. 20. part. 1.* gives us several decisions to this purpose, and amongst other decisions; tells us of two Mountibanks who were burnt with hot Tongs to death, for having poyson'd ten several persons. But if a Physician would poyson his Patient, it would be certainly Treason with us, as being Murder under trust.

TITLE

TITLE. IX.

De Incendiariis, or Fire-raisers.

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1. *Malicious and designed Fire-raising is only punishable by death.*
 2. *What presumptions can prove this design.*
 3. *Whether one may be punished for burning his own House?*
 4. *The punishment of Fire-raising according to the Civil Law.*
 5. *The punishment of it according to our Law.*
 6. *The burning of Coal-heughs how punished.*
 7. *Whether the drowning a Coal-heugh be punishable, as the burning of it.*
 8. *Fire-raising cannot be remitted.*
 9. *The punishment *culposi incendii*.*
 10. *How accidental Fire-raising is to be punished.*
 11. *How Masters are to be punished for their Servants negligence.*

IT is most unnatural that the Elements which were created to be Servants to Man, should have dominion over him: And therefore these who raise Fire are reputed great enemies to mankind, and more criminal then either Thieves or Murderers. For in Theft, the thing stolen remains still with the Commonwealth, whereas it is absolutely destroyed by Fire: And in Murder the Crime extends never further then the design, whereas in Fire-raising, the merciless Element which is employed, debords oft beyond its commission, and involves in the common misery those against whom the Fire-raiser had no design, with those who were his known enemies. And there
for

fore those who raise Fire within a Town are burnt; whereas those who burn only a House are not so grievously punished.

I. A Fire-raiser, or *Incendarius*, is by Lawyers defined to be he who of design raiseth Fire, whether he kindle the same with his own hand, or commissionat another, or executes himself anothers Commission. And because of the atrociousness of this Crime, the attempt is punished, though the effect follow not, and threatnings, though nothing follow, are punished, *Damhaud. rubrica de Incendiariis*, but because this Crime is of so high a nature, and that it is improbable that any would be so merciless to commit the same, therefore the Law requires that the Fire-raising which is punishable, be committed *dolo malo*: And with us it is required they be *combustores domorum nequiter & malitiose*, as *Skeen* translates it, *ad cap. 10. Malcolmi. 2.* And wilful Fire-raising is only declared punishable by death, *Cap. 8. Parl. 3. F. 5.*

II. But since design and *dolus* are acts of the mind, therefore they are infer'd from presumptions, and what presumptions are necessary in this case, are very well related by *Far. quest. 110. cap. 2.* And *John Meldrum* was execute upon presumptions, 2 Aug. 1633. where he being pursued for burning the House of *Frendrick*: The only presumptions adduced against him were, great threatnings, capital enmity, his contradicting himself in his own Examinations, common brute and open fame, that he was the burner. But I think that case very hard, and not to be drawn in consequence, for though the *dolus* and design may be proved by presumptions, because that is an act of the mind, yet the burning it self being an external act, should only be proved by Witnesses and confession. 2. Seing *probatio presumptiva* is but *fititi*, it were hard to allow both the burning it self, and *quo animo* the Fire was raised to be proved by presumptions against that common rule in Law, that *due fictiones non cadunt in eandem rem.* 3. Lawyers are positive, that *dolus debet possit probari manifeste*, *Bertez. consil. 322.*

III. It is doubted among the Doctors, whether he that burns his own House may be punished as *Incendarius*, since *quilibet est rei suae arbiter*, and dominion is defined to be the using of any thing as we think fit. But since Fire-raising is oft-times punished, not only for the prejudice it hath done, *sed quia flamma potuit longius è vagari*, therefore Fire-raising should be punished in this case. And as it is not presumable that any man will burn his own without design, so if this were not punished, men might upon the pretext of burning their own waste and destroy their own, and ruine their neighbours. And he might very well be presumed to have had a design against his Neighbours; but though the immediat dominion belong to private persons, yet the King has also an interest, & *dominium directum*. And as no man can kill himself lawfully, so neither can he burn his own House, except he can instruct that he did the same upon a just and reasonable cause.

IV. The punishment of Fire-raising by the Civil Law, was various, and suitable to the several degrees of the Crime; for raisers of Fire within a Town were burnt alive: Those who burnt Corns beside Houses were bound and beat, and then burnt, but not burnt quick, as we speak, *lex 28. parag. Incendarii ff. de panis*. but the burning of a House or Village was not so highly punish'd. And *Clarus Quest. 68.* thinks that the Statutory pain of Fire-raising, if it be capital, should not take place in small Fire-raising: But since a small spark may kindle a great fire, this conclusion seems very unwarrantable, if the Fire was designedly rais'd.

V. According to our Law, the burning of folks in their Houses, and Corns, and wilful Fire-raising, is Treason: And Læse Majestie, *7a. 5. p. 3. cap. 8.* From which Act it is to be observed, 1. That the Particle *and*, is not here copulative, but a disjunctive, for either of these cases, *viz.* the burning of Corns is *per se* Treason. 2. It is observable, that all Fire-raising is not Treason (though the Rubrick of the Act bear, that all Fire-raising is Treason) which may be concluded by these

these reasons, 1. That all punishments should be commensurate to the Delicts and Crimes which are punished; and therefore since Fire-raising is very various, it were unjust that they should be all equally punished, especially the punishment here being Treason, which were too severe for burning Peets in a Moss, or a little Cottage standing in a Moor, where the guilt is so small, that the offenders in these cases should be capital-ly punished. And in a case pursued against *Mackenzie of Suddie*, upon the 29. July 1693. for burning some fewel standing upon a Moor, the Justices would not sustain this as Treason. 2. If all Fire-raising were by this Act Treason, there needed not a posterior Act have been made, *cap. 146. p. 12. Fa. 6.* declaring that wilful Fire-raising in Coal-heughs, upon malice and despite, is punishable as Treason. 3. By the foresaid Act of K. *Fa. 5.* it needed not to have been said that the burning of Folks in their Houses, and the burning of Houses and Corns should be Treason, if generally all Fire-raising were Treason.

For the better understanding then of that Act, we must consider that there are three several species of Fire-raising declared to be Treason by that Act: The first is, the burning Folks in their Houses, which must be interpret likewise to be the burning of Dwelling Houses, though the People were not accidentally there, or were possibly there, and escaped. Which species of Fire-raising is most severely punished, both because Fire-raising was of all others the most horrid, *& domus sua est unicuique tutissimum refugium*, and because ordinarily the burning of all the persons dwelling in the House is thereby designed, as well as the burning the House it self.

The second species is, the burning Houses and Corns, which is suitable to the foresaid 28. Law *ff. de pœnis*, where it is said, that *qui acervum frumenti juxta ades positum combusserit, vinctus, verberatusque, igne necatur.*

The third species is, wilful Fire-raising, which differs in this from Burning, that Burning is of a particular place, with

design to destroy no more: But Fire-raising is the burning a particular place, with design to burn more; as to kindle a little Corn upon design to burn the whole Field.

VI. The other Act making the burning of Coal-heughs to be Treason, was practised upon *John Henry*, 14. June 1615. who was hang'd thereupon: And the reason of this Law was founded upon the favourableness of that Manufactory, which some do ruine by putting fire in them, which is so easie, that nothing could defend against it, but the severity of such a Law as this, and upon the greatnes of the hazard which did arise by such Fires as this, which could never be quenched when once kindled.

VII. I was once consulted whether the drowning of Coal-heughs was Treason by this Act, since *erat eadem ratio utrobique*, but I thought not, because penal Laws, especially in which the punishment is so severe as Treason; should not be extended, as is elsewhere largely debated. And the hazard of drowning a Coal-heugh is not equal to the burning of it; for drowning can be easier removed, and cannot spread so far.

VIII. So odious is this Crime, that it is expressly provided it shall be one of the four points of the Crown, and so can only be cognosced by the Justices; and all remissions granted for Fire-raising are declared null: But this last is not *in viridi observatione*. And Fire-raising being included in the Earl of Caithness remission, it was sustained, though thir Acts were objected.

IX. If *dolo* and design cannot be proved in the Fire-raising, so that it were accidental, *sed si culpa incendio causam dederit*, there is a Civil Action, by the Civil Law allow'd, *ex lege aquilia*: But for the further understanding *incendii culpas*, the more exact Doctors do distinguish betwixt *incendium ex culpa lata*, *ex culpa levi*, & *ex culpa levissima commissum*. And since *culpa lata aequi paratur dolo*, therefore they make it to be corporeally punishable, though in that case the punishment is not extended to death; but if the same be committed only *ex culpa*

culpa levi, then it is to be punished by a Fine: but if the committer have not wherewith to pay his Fine, he may Subſidiarily be punished in his perſon: But if the Fire be raiſed *per culpam leviſſimam*, then the committer can never be punished corporeally, even though he want Money wherewith to pay his Fine, *dicunt tamen aliqui culpam leviſſimam in faciendo, aequiparari culpa levi in committendo, Alex. con. 55.*

IX. By our Law, he who burns a Houſe in a Town by miſ-governance, and *not of ſet purpoſe*, as the Act ſayes, he ſhall be punished at the ſight of the Magiſtrats of the Town, and his Goods, ſhall be given to him who ſuffers the prejudice, and ſhall likewiſe be baniſhed for three years; and if he have no Goods, he ſhall be ſcourged at the Mercat Croſs, and throw the Town, and ſhall be baniſhed for ſeven years; but if he who owes the Houſe, do either by himſelf, his Wiſe, or Bairns, (*i. e.* negligently) burn his own Houſe, albeit no Neighbour be thereby prejudged, yet he ſhall be baniſh'd the Town for three years: And if he to whom the Houſe is ſet burn the ſame negligently, he ſhall repair the dammage, and be baniſhed for three years: Or if a Stranger, or Traveller, burn, as ſaid is, he ſhall be Arreſted, and repair the ſkaith, which if he be not able to do, he ſhall abide in Sickerneſs (*i. e.* in Priſon) at the King's will: And if the Governours of the Town be negligent in the execution of their Office, they are to be unſlawed in ten pounds: And if Fire happens in Huſband-Towns, in Barronies, they are to be punished by the Lords, *i. e.* Barrons in like-manner as Magiſtrats do within Burgh, *Ja. 1. Parl. 4. cap. 75.*

By this Act likewiſe, no Fire is to be carried from on Houſe to another, but in a covered Veſſel, under the pain of an Un-law; but ſince this Un-law is not expreſt, it is therefore Arbitrary to the Judge to raiſe it as high as his Jurisdiction will ſuffer, though in juſtice he ſhould proportion it to the Crime, eſpecially ſince it is not tax'd here of deſign, that it may be proportioned, as ſaid is.

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Upon this Act there may be several doubts raised, as first, What is meant by the word *misgovernance*, for clearing whereof, the common distinction made by the Doctors, and related by *Alexander Consilio 55.* would be considered. And it appears that misgovernance in this case does include *culpam levisissimam*, the meanest fault, because the Act bears *misgovernance*, and *not of set purpose*; so that whatever is not of set purpose, or designed, is punishable by this Act. Likeas, the word *recklessly*, which is likewise used in this Act, as exegetick of the former, may be properly enough extended to *culpa levisissima*; but yet it may be argued upon the other hand, that since the punishment of Servants raising Fire by misgovernance, is to be Scourged publickly, and then Banished, and that Masters are punished if they burn their own Houses, after that manner, it were hard to extend this punishment *ad culpam levisissimam*: and as the Law interprets obligations to give Wine or Corn, neither to be extended to the best, nor worst of that species; so in this case, misgovernance should be interpret, as that it may properly neither be meant of *culpa lata*, nor *levisissima*, but of *culpa levis*, which is *media*: and the word misgovernance properly doth imply a fault that is considerable, & *verba paenam imponentia, sunt strictissime interpretanda*, as Lawyers observe. 2. It may be doubted, whether if Children who are not come to that age at which they are only punishable themselves, should burn the Fathers House, if the Father be punishable by this Act, *eo casu*; and albeit it would seem that he is, seeing accident without judgement is punished in this case, by repairing the damage done, yet it is more suitable to reason to conclude that he is not, because 1. He who hath no government by Law of himself, or any thing else, cannot be said to do any thing by misgovernance. 2. Children in Law are *equiparat* to furious persons, or Idiots; and as the Father could not be punishable for what is done by his Children, being furious, and Idiots, so neither can he be punishable for what is done by them whilst they are *impuberes*. 3. *Quia accessorius sequitur*

sequitur naturam sui principalis, & subsidiarium naturam ejus cui est subsidiarium, and therefore, where the Child himself cannot be punished, we ought to conclude that the Father ought not to be punished for him.

XI. The Doctors do conclude that the Master of the Family is bound not only for his own, but likewise for the fault of any of the Family who raiseth Fire, for having choos'd them himself, he ought to be lyable for their fault, and he ought to blame himself for not choos'ing of better Servants. But this is to be restricted to the injuries done by the Servants in their respective employments to which they were made overseers by Masters: As for instance, if the Cook should leave the Fire securely at night in the Kitchen, but a Laquie belonging to the House should thereafter come in to the Kitchen and scatter it so as that both their Masters and the Neighbours House were burnt, they conclude that the Master would not be lyable to make up his Neighbours dammage, since the Master was not to be blamed, the person choos'd by him having done his duty, *Carpz. part. 1. quest. 39. num. 51, & 52.* But this seems unreasonable, for it may be alledged that the Master should not have choos'd any such Servants: And it is all one to the Neighbours, by whom the prejudice is done, or whether it was done without the committers office, or not. And therefore it were fit to consider whether the person who did the injury was known to be a profligate or vicious person before he was employ'd. And it seems that this may be the interest of the Common wealth, because it would secure Neighbours, and be advantageous for the Common wealth, that none should employ Servants who are not sufficient.

TITLE.

TITLE X.

Witch-craft

1. Wierus arguments against the punishing of Witches, with the answers thereto.
2. Some observations which may perswade a Judge to be cautious in judging this Crime.
3. Upon what presumptions Witches may be apprehended.
4. Who are Judges competent thereto.
5. Paction with the Devil.
6. Renouncing of Baptism.
7. The Devils mark.
8. Threatning to do mischief; how punishable.
9. Malefices where there are no connection betwixt the cause and the effect.
10. The using Magick Arts for good ends. how punishable.
11. Consulting with Witches how punished.
12. What the being defamed by the Witches imports.
13. A Witches confession not punishable, except the thing confessed be possible, & de succubis & incubis.
14. Whether the transportations confess, be real, and though real, whether punishable.
15. Whether a Witch can cause any person be possessed.
16. Whether penetration be possible.
17. Whether transformation be possible.
18. Whether he can make Bruits to speak, or raise storms.
19. Whether Witches may transfer diseases, and whether it be lawfull to seek their help for this.
20. Whether Witches may kill by their looks.
21. Whether they can procure love by their potions.
22. How they torment men by their Images.
23. Whether

23. *Whether Confessions before Kirk Sessions be relevant.*
24. *Who can be Witnesses in this Crime.*
25. *The punishment of this Crime by the Civil Law, and ours.*
26. *The punishment of it by the Law of England.*

THat there are Witches, Divines cannot doubt, since the Word of God hath ordain'd that no Witch shall live; nor Lawyers in *Scotland*, seing our Law ordains it to be punished with death. And though many Lawyers in *Holland*, and elsewhere, do think, that albeit there were Witches under the Law, yet there are none under the Gospel; the Devils power having ceased, as to these, as well as in his giving Responses by Oracles.

I. *Wierus*, that great Patron of Witch-craft, endeavours to maintain his opinion by these Arguments, 1. That such as are accused of Witch-craft are ordinarily silly old Women, whose Age and Sex disposeth them to Melancholy, and whose Melancholy disposeth them to a madnesse, which should render their Confessions very suspect: And in this Crime there are seldom other prooves; whereas the things confest are so horrid, that it cannot be imagined any reasonable creature would commit them. 2. God can only work the Miracle ascribed to Witches; he who is the Author of Nature being only able to alter or divert its course. And the Devil doth but delude the fancy of poor Creatures, as Feavers and Melancholy misrepresent objects: Nor are such as are cheated in the one more guilty then they who are sick of the other. And it is severe to burn men and women for doing that which is concluded impossible to be done by them. 3. It is unjust to punish them for doing ill by Charms, except it could be first proved that these Charms produc'd the effects that are punishable; and Lawyers should argue thus, those who kill or hurt Men or Beasts by unlawful means, are punishable by death. But so it is, that Witches and Charmers kill Men and Beasts by unlawful means, and therefore Charmers ought to be punished by death, Off which

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Syllogism

Syllogism *Wierus* denies the Minor, for it can never be proved that Verbes, Crosses, or laying Flesh in the Threshold, &c. can destroy Men or Beasts, these being causes very disproportionable to such effects, there being no Contract betwixt the Agent and Patient in these cases. 4. These who execute the will of God are not punishable, for that is their duty, and so cannot be their Crime. But so it is, that whatever the Devil or Witches do, is decreed by God either for tryal or punishment expressly, and without his permission nothing can be done. And if the Devil were not acting here by obedience, or were at liberty, he would not leave any one man undestroyed, or any of Gods works undefaced.

But that there are Witches, and that they are punishable capitally, not only when they Poyson or Murder, but even for Enchanting and deluding the world, is clear by an express Text; *Exod. 22. Vers. 18. Thou shalt not suffer a Witch to live.* And it is observable, that the same word which expresses a Witch here, is that which is used in *Exod. 7.* to express those Magicians who deluded only the people by transfor ming a Rod into a Serpent, as *Moses* had done, though no person was prejudged by their cheat and illusion. Likeas, *Lew. 24. and 27.* It is ordained that a man or a woman that hath a familiar spirit, or that is a Wizard, shall sure'y be put to death; they shall stone them with stones; their blood shall be upon them. Which Laws were in such observation amongst the Jews, that the Witch of *Endor*, *1 Sam. 28.* was afraid to use her Sorcerie before the King, because the King had cut off those who had Familiar Spirits and Wizards out of the Land. And so great indignation did the eternal God bear to this sin, that he did destroy the Ten Tribes of *Israel* because they were addicted to it.

Nor were the Jews only enemies to this vice, but even the Heathens following the Dictats of Nature, punished Witches as enemies to the author of it; for the *Persians* dashed their heads against Stones, as *Minsing* observes, *ad. S. Item lex Cornelia*

Cornelia inst. de pub. jud. and *Tacitus* lib. 2. *Annal.* tells us, that *Publius Marcius* and *Pituanus* were execute for this Crime: for which likewise *Valerius Maximus*, lib. 6. cap. 3. tells us, that *Publicia* and *Lucinia* were with three score and ten other *Romans* hang'd. But since it is expressly condemned in Scripture, and by many general Councils, such as *Aurelian*, *Toletan*, and *Anaciritan*, it should not be lawful for us to debate what the Law hath expressly condemn'd, by the same reason, that we should deny Witches, we must deny the truth of all History, Ecclesiastick and Secular: And *Plutarch*, lib. 5. *Sumpf.* cap. 7. observes, *Quodammodo Philosophiam tollunt qui rebus mirabilibus fidem non habent oportet autem qua ratione aliquid fiat, ratione tractare, quod vero id fiat, ex ratione est sumendum.* It is sure that the Devil having the power and will to prejudge men, cannot but be ready to execute all that is in Witch-craft: And it is as credible that God would suffer men to be convinc'd by this means, that there are Spirits, and that by thir means he would give continued proofs of his power in repressing the Devil, and of the necessity that silly men have of depending upon his infinit power.

To the former Arguments it may be answered, that as to the first, all sins and vices are the effects of delusion; nor are Witches more deluded by Melancholy, then Murderers are by Rage or Revenge. And though it hath never been seen that persons naturally mad, have been either guilty of, or punished for this Crime, the Devil designing in this Crime to gain only such as can damn themselves by giving a free consent. Yet if Madness could be proved, or did appear, it would certainly defend both against the guilt and punishment: And therefore such a series of clear circumstances should concur before a person be found guilty of this Crime, as should be able to secure the Pannel, and satisfie the Judge fully in the Quærie. But since daily experience convinces the world that there may be such a Crime, and that the Law exacts either confession, or clear proofs, who can condemn the Law as rigorous in this case,

since without believing these there could be no Justice administrat, and whilst Judges shun'd to punish it in some cases, they behov'd to suffer it from the same arguments to go unpunished in all cases.

To the second, it is answered, that though neither the Devil nor Witches can work miracles, yet the offering to cheat the world by a commerce with the Devil, and the very believing that the Devil is able to do such things for them, should be a sufficient Crime; but much more when they believe all those things to be done by themselves, they giving their own express consent to the Crime, and concurring by all that in them is to the commission of it. Likeas, it is undeniable that the Devil knowing all the secrets of Nature, may be applying Actives to Passives, that are unknown to us, produce real effects which seem impossible.

To the third, though Charms be not able to produce the effects that are punishable in Witches, yet since these effects cannot be produced without the Devil, and that he will not employ himself at the desire of any who have not resigned themselves wholly to him, it is very just that the users of these should be punished, being guilty at least of Apostasie and Heresie.

The fourth Argument is but a meer and silly Sophism, for though God in his providence permits at least all things that are done, to be done, yet such as condemn either the commands of him or his Vicegerents ought to be punish'd.

I cannot but acknowledge that there are some secrets in Nature which would have been lookt upon in the first Authors as the effects of Magick: And I believe that in the duller Nations a Philosopher drawing Iron with a Loadstone might have run a great risque of being burnt; and it is hard to give a judgement of *Naudens* learned Book in favours of the *Persian* Magicians, the *Assyrian Chaldeans*, the *Indian* Gymnosophists, and the Druids of the *Gauls*; for it cannot be denyed but that many true Mathematicians and Physicians have pass

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for Magicians in the duller ages of the world, but as to this, there is now no fear since Learning hath sufficiently illuminat the world, so as to distinguish betwixt these two. But I am still jealous of those Sages who were frequented by Familiar Spirits, though they were otherwise very excellent men, such as *Porphir*, *Amblicus*, *Plotin*, and others, who pretended by the purity of their lives to be so spiritual, as to deserve the friendship of Spirits: For besides that the Primitive Fathers and Doctors of the Church have testified against such, as meer Magicians. It is not intelligible how those Spirits which frequented them could be good, since they were tempted to fall from the true Religion to Paganism, and did offer such Sacrifices as the true God did never allow; and if such impostures were allowed, it were easie for any to defend themselves, being truly Witches.

II. Albeit Witch-craft be the greatest of Crimes, since it includes in it the grossest of Heresies, and Blasphemies, and Treasons against God, in preferring to the Almighty his rebel and enemy, and in thinking the Devil worthier of being served and revered, and is accompanied with Murder, Poysoning, Bestiality, and other horrid Crimes. Yet I conclude only from this, that when Witches are found guilty, they should be most severely punished, not with Scourging and Banishment, as the custom of *Savoy* was related to be by *Gothofred*, *hoc tit*, but by the most ignominious of deaths. Yet from the horridness of this Crime, I do conclude, that of all Crimes it requires the clearest relevancy, and most convincing probation. And I condemn next to the Witches themselves, those cruel and too forward Judges, who burn persons by thousands as guilty of this Crime, to whom I shall recommend these considerations,

I. That it is not presumeable that any who hear of the kindness of God to men, and of the Devils malice against them; of the rewards of Heaven, and torments of Hell, would deliberately enter into the service of that wicked Spirit, whom they know

know to have no riches to bestow, nor power to help, except it be allowed by permission, that he may tempt men: And that he being a liar from the beginning, his promises deserve no belief, especially since in no mans experience he hath ever advantag'd any person: whereas on the contrary, his service hath brought all who entered in it to the Stake.

II. Those poor persons who are ordinarily accused of the Crime, are poor ignorant creatures, and oft-times Women who understand not the nature of what they are accused of; and many mistake their own fears and apprehensions for Witch-craft; of which I shall give you two instances, one of a poor Weaver, who after he had confess'd Witch-craft, being asked how he saw the Devil, he answered, *Like Flies dancing about the Candle*. Another of a Woman, who asked seriously when she was accused, if a Woman might be a Witch and not know it? And it is dangerous that these who are of all others the most simple, should be tryed for a Crime, which to all others is most mysterious.

III. These poor creatures when they are defamed, become so confounded with fear, and the close Prison in which they are kept, and so starved for want of meat and sleep, (either of which wants is enough to disorder the strongest reason) that hardly wiser and more serious people than they would escape distraction: And when men are confounded with fear and apprehension, they will imagine things very ridiculous and absurd, and as no man would escape a profound melancholy upon such an occasion, and amidst such usages; therefore I remit to Physicians and others to consider what may be the effects of melancholy, which hath oft made men, who appeared otherwise solid enough, imagine they were Horses, or had lost their Noses, &c. And since it may make men erre in things which are oblivious to their senses, what may be expected to things which transcends the wisest mens reason.

IV. Most of these poor creatures are tortur'd by their keepers, who being perswaded they do God good service, think

their duty to vex and torment poor Prisoners : And I know *ex*
certissima scientia, that most of all that ever were taken, were
tormented after this manner, and this usage was the ground of
all their confession: and albeit the poor miscreants cannot prove
this usage, the actors being the only witnesses, yet the Judge
should be afraid of it, as that which at first did elicit the confes-
sion, and for fear of which they dare not retract it.

V. I went when I was a Justice-Depute to examine some
Women, who had confest judicially, and one of them, who
was a silly creature, told me under secrecie, that she had not
confest because she was guilty, but being a poor creature, who
thought for her meat, and being defam'd for a Witch she knew
she would starve, for no person thereafter would either give
her meat or lodging, and that all men would beat her, and
hound Dogs at her, and that therefore she desired to be out of
the World; whereupon she wept most bitterly, and upon her
knees call'd God to witness to what she said. Another told
me that she was afraid the Devil would challenge a right to her,
after she was said to be his servant, and would haunt her, as the
Minister said when he was desiring her to confest, and there-
fore she desired to die. And really Ministers are oft-times in-
screet in their zeal, to have poor creatures to confest in this
manner, and I recommend to Judges that the wisest Ministers should
be sent to them, and those who are sent, should be cautious in
their answers.

VI. Many of them confest things which all Divines con-
fess to be impossible, as transmutation of their bodies into beasts,
and money into stones, and their going through walls and clos-
ets, and doors, and a thousand other ridiculous things, which have no
ground either in truth nor existence but in their fancy.

VII. The Accusers here are Masters, or Neighbours who
have their Children dead, and are engaged by grief to suspect
these poor creatures. I knew one likewise burnt because the
husband was jealous of her with her Husband : And the Crime is
so odious that they are never assisted or defended by their re-
spectful relations.

VIII. The Witnesses and Assysers are afraid that if they escape that they will die for it, and therefore they take an unwarrantable latitude. And I have observed that scarce ever any who were accused before a Countrey Assize of Neighbours did escape that tryal.

IX. Commissions are granted ordinarily to Gentlemen, and others in the Countrey who are suspect upon this account: and who are not exactly enough acquaint with the nature of the Crime, which is so debateable amongst the most learned: Nor have the Pannels any to plead for them, and to take notice who are led as Witnesses; so that many are admitted who are *testes inhabiles*, and suspect: And albeit their confessions are sent to, and advised by the Council before such Commissions be granted, yet the Council cannot know how these confessions were emitted, nor all the circumstances which are necessary and cannot be known at a distance. Very many of these poor silly Women do reseat at the Stake from the confessions they emitted at the Bar, and yet have died very penitent: And it is presumeable that few will accuse themselves, or confess against their own life, yet very many confess this Crime.

3. The method I shall use in treating of this Crime shall be

1. Upon what suspicion Witches may be apprehended. 2. What Judges are competent. 3. What Ditties are relevant.

4. What probation is sufficient. 5. What is the ordinary punishment. As to the first, I know it is ordinary in Scotland

not only that Magistrats do apprehend Witches almost upon any dilation, but even Gentlemen, and such as are Masters of the Ground, do likewise make them prisoners, and keep them so till they transmit them at their pleasure to Justices of Peace, Magistrats, or to some open Prisons. But all this procedure is most unwarrantable, for Gentlemen, and such as are invested with no authority, should upon no account without special warrand apprehend any upon suspicion that they are Witches, since to apprehend is an act of jurisdiction; and therefore I think no prison should receive any as suspected Witch.

Witch

Witch-craft, until they know that the person offered to them be apprehended by lawful Authority. 2. Since imprisonment is a punishment, and constantly attended with much infamy to the name, and detriment to the affairs of him who is imprisoned, especially in Witch-craft: I do conclude that there must some presumption precede all inquisition. For the meanest degrees of inquisition, though without captour, does somewhat defame. And that the person should not be apprehended except it appear by the event of the inquisition, that she lyes under either many or pregnant suspicions, such as that she is defamed by other Witches; that she hath been her self of an evil fame; that she hath been found Charming, or that the ordinary Instruments of Charming be found in her House. And according to *Delrio's* opinion, *lib. 5. Sect. 2. ad assumendas informationes, sufficiunt levia iudicia, sed gravia requiruntur ad hoc ut citetur reus, & ut iudex specialiter inquirat.*

IV. Witch-craft was *crimen utriusque fori*, by the Canon Law: and with us the Kirk-sessions use to inquire into it, in order to the Scandal; and to take the confession of the Parties, to receive Witnesses against them; as is clear by the Process of *Fanet Barker and Margaret Lawder, Decemb 9. 1643.* But since so much weight is laid upon the depositions there emitted, Kirk-sessions should be very cautious in their proceedings.

By the Act of Parliament *2. M. 9. Parl. 73. Act.* All Sheriffs, Lords of Regalities, and their Deputes, and all other Judges having power to execute the same, are ordained to execute that Act against Witch-craft, which can import no more, but that they should concur to the punishment of the Crime, by apprehending, or imprisoning the party suspect: But it doth not follow, that because they may concur, that therefore they are Judges competent to the cognition of the Crime; since the relevancy in it is oft-times so intricat, and the procedure requires necessarily so much arbitrariness, and the punishment is so severe, that these considerations joyntly should ap-

propiat the cognition thereof solely to the Justice Court. Nor find I any instances wherein these Inferior Courts have tryed this Crime. And albeit the Council do oft-times grant Commissions to Countrey-men, yet that seems dangerous; nor can I see why by expresse Act of Parliament it should have been appointed, that no Commission should be granted for trying Murder, and yet Witch-craft should be so tryed by Commissions. The Justices then are the proper Judges in Witch-craft.

V. As to the relevancy in this Crime, the first Article useth to be *paction* to serve the Devil, which is certainly relevant, *per se*, without any addition, as is to be seen in all the indictments, especially in that of *Margaret Hutchison, August 10, 1661.* And by *Delrio, Carpz. p. 1. quest. 49.* and others; but because the Devil useth to appear in the similitude of a man, when he desireth these poor creatures to serve him, therefore they should be interrogat, if they knew him to be the Devil when they condescended to his service.

Paction with the Devil is divided by Lawyers, in *expressum*, & *tacitum*, an expresse and tacit paction. Expresse paction is performed either by a formal promise given to the Devil then present, or by presenting a supplication to him, or by giving the promise to a Proxie or Commissioner impowered by the Devil for that effect, which is used by some who dare not see himself. The formula set down by *Delrio*, is, *I deny God Creator of Heaven and Earth, and I adhere to thee, and believe in thee.* But by the Journal Books it appears, that the ordinary form of expresse paction confest by our witness, is a simple promise to serve him. Tacit paction is either when a person who hath made no expresse paction, useth the words or signs which Sorcerers use, knowing them to be such, either by their Books, or Discourse; and this is condemned as Sorcery, *Can. 26. quest. 5.* and is relevant to infer the Crime of Witch-craft, or to use these words and signs, though the user know them not to be such; and this is no Crime, if the ignorance be probable.

bable, and if the user be content to abstain, *Delrio, lib. 2. quest. 4.*

VI. Renouncing of Baptism is by *Delrio* made an effect of Paction, yet with us it is *per se* relevant, as was found in the former Procel of *Margaret Hutchison*: and the solemnity confessed by our Witches, is the putting one hand to the crown of the head; and another to the sole of the foot, renouncing their Baptism in that posture. *Delrio* tells us, that the Devil useth to Baptize them of new, and to wipe off their brow the old Baptism: And our Witches confess alwayes the giving them new names, which are very ridiculous, as *Red-shanks, Serjeant, &c.*

VII. The Devils mark useth to be a great Article with us, but it is not *per se* found relevant, except it be contest by them, that they got that mark with their own consent; *quo casu*, it is equivalent to a Paction. This mark is given them, as is alleadg'd, by a nip in any part of the body, and it is blew; *Delrio* calls it *Stigma*, or Character, *lib. 2. quest. 4.* and alleadges that it is sometimes like the impression of a Hares foot, or the foot of a Rat, or Spider, *l. 5. Sect. 4. num. 28.* Some think that it is impossible there can be any mark which is insensible, and will not bleed; for all things that live must have blood, and so this place behov'd both to be dead and alive at once, and behov'd to live without aliment; for blood is the aliment of the body: but it is very easie to conceive that the Devil may make a place insensible at a time, or may apply things that may squeez out the blood.

This mark is discovered amongst us by a Pricker, whose Trade it is, and who learns it as other Trades; but this is a horrid cheat: for they alleadge that if the place bleed not, or if the person be not sensible, he or she is infallibly a Witch. But as *Delrio* confesses, it is very hard to know any such mark, *à novo, clavo, vel impertigine naturali*, and there are many pieces of dead flesh which are insensible, even in living bodies: And a Villain who used this Trade with us, being in the year 1666.

apprehended for other villanies, did confess all this Trade to be a meer cheat.

VIII. Threatening to do mischief, if any evil follow immediately, hath been too ordinarily found a relevant Article to infer Witch-craft with us. Thus *Agnes Finnie* was pursued in Anno 1843. upon the general Article of having witch'd several persons; and particularly for these Articles, 1. That *William Fairlie* having nick-named and called her *Annie Winnie*, she swore in rage he should go halting home, and within 24. hours he took a Palsie. 2. That *Beatrice Nisbit* refusing to pay the said *Agnes* the Annualrent of two Dollors owing by *Hector Nisbit* her Father, she told her she should repent it, and within an hour thereafter she lost her Tongue, and the power of her right Side. 3. That *Fanet Greintoun* having refused to carry away two Herrings she had bought from the said *Agnes*, and to pay for them, she told her it should be the last meat she should eat, and within a little after she fell sick: Against which Articles it was there alledged that this Libell was not relevant, and could not go to the knowledge of an Inquest: 1. Because no means were condescended upon from which the Witch-craft was inferred: And if this Libell were relevant, it would be relevant to Libell generally that the Pannel were a Witch. 2. Affizers are only Judges to the matter of fact, and not to what consists *injure*. But so it is, that if this Libell were to pass to the knowledge of an Inquest, all the debate *injure* behoved to be before the Affize before whom the Pannels Procurators behoved to debate how far *mina & damnum sequuntur* are relevant, and how far any person is punishable as a Witch, though no Charms or other means commonly used by Witches be condescended upon; and as to the threatnings, they were not relevant, seeing they had not all the requisits which are exprest by the Doctors as requisite, for they were not specifick, bearing the promise to do a particular ill, as that *Fairlie* should take a Palsie, or *Nisbit* lose her Tongue. 2. There was not a preceeding reason of enmity proved, nor

is it probable that for so small a matter as a Herring, or the Annualrent of two Dollors, she would have killed any person, and exposed her self to hazard; nor was the effect immediat, nor such as could not have proceeded from any other natural cause, without all which had concur'd. *Delrio lib. 5. Se 3.* is very clear, that *mina etiam cum damno sequuto*, are not so much as a presumption: but though all these did concur, it is very clear, both from *Delrio ibid.* and *Farin quest. 5. num. 37.* That all these threatnings are not sufficient to inter the Crime of Witch-craft. Lastly, It was offered to be proved, that some of these persons died of a natural disease; depending upon causes preceeding that threatning: Notwithstanding of all which, the Libell was found relevant, and she was burnt. But I think this decision very hard, and very contrary to the opinion of all received Writers, who think, that albeit *mina* be *admiculata* with all the former advantages, & *probata de ea qua solet minas exequi*, yet the same are only sufficient to infer an Arbitrary punishment, not Corporal, but Pecuniary; and certainly such a wicked custom as threatning, is in it self a Crime: And thus it was only well found to be *crimen in suo genere*, in the Process led against *Katherin Oswald*; Novemb. 11. 1629.

IX. Sometimes Articles are Libel'd, wherein the malefic hath no dependence at all upon the means used: And thus it was Libel'd against *Margaret Hutchison*, August 20. 1661. That *John Clarks* Wife being sick, she came to the Bed side when all the Doors and Windows were fast, and comb'd her head several nights; and the last of these nights she came to the Bed side, and put her hand to the Womans Pape, whereupon the Child died, which Article was found relevant *per se*. And it was Libel'd against *Fanet Cock*, September 7. 1661. that a Woman called *Spindie* being at enmity with her, she gave her a cuff, whereupon *Spindie* immediatly distracted; and being reproved therefore by the Minister of *Dalkeith*, he immediatly distracted; which Article was likewise found relevant.

vant, being joyned with fame and dilation: Which decisions are in my opinion very dangerous, for they want a sure foundation, and are precedents whereby Judges may become very arbitrary. And against these I may oppose a third alledgeance used in the former Process against *Agnes Finnie*, wherein it was alledged, that the conclusion of all Criminal Libels should be necessarily inferred from the deed sublumed, and that *conclusio semper sequitur debiliorem partem: nam libellus est syllogismus apodicticus, sed non probabilis*; and therefore except the Libel could condescend upon some means used by the Pannel, from which the malefice were necessarily infer'd, it could not be concluded that these Malefices were done by her, or that she was guilty of the wrong done. Thus *Bodin lib. 4.* does conclude, that *venefica non sunt condemnanda licet sint deprehensa cum buffonibus, osibus, aliisque instrumentis egredientes ex ovili licet oves immediate moriantur*. And *Perkins cap. 6.* asserts, that neither defamation nor threatnings, albeit what is threatned does follow, nor *mala fama*, nor the Defuncts laying the blame of their death upon the person accused (called *inculpatio* by the Doctors) can infer this Crime, though all these be conjoyned; for in his opinion, nothing can be a sufficient ground to condemn a Witch, except the Pannels own confession, or the depositions of two famous Witnesses, deponing upon means used by the Pannel. And it is remakable, that in the Chapter immediatly subsequnt to that wherein Witches are ordinarily to be put to death, God hath expressly ordained, that *of the mouth of two or three Witnesses every word shall be established*. And in the Process deduced against *Isobel Young* for Witchcraft, Feb. 4. 1629. and against *Katherine Oswald*, November 11. 1629. This point is likewise debated, it being Libelled against the said *Katherine*, that by her Witch-craft she caused a Cow give blood in stead of milk; and caused a Woman fall and break a rib in her side. Against which it was alledged, that there was no necessar connexion there, *inter terminum quo & ad quem inter causam & effectum*: But on the contrary

the Cowes giving blood for milk might proceed from another natural cause, *viz.* from lying upon an Ant or Emmot hill; and therefore I think that because we know not what vertue may be in Herbs, Stones, or other things which may be applyed, it were very hard to find Cures performed by the application of these, without the using Charms, or Spells, to be Witch-craft: But when these outward applications are used, to do hurt; as for instance, if the said *Margaret Wallace*, being at enmity with *John Clark*, and after she was forbidden to frequent his House, did continue to frequent the same, and did throw in blood or any unusual thing upon his Wifes Pap: if the Child who suck'd the same had thereafter died, I think this Article, joyned with preceeding defamation of her by another Witch, might have been found relevant, because she was there *in re illicita*. And since the Law cannot know exactly what efficacy there is in natural causes, it may very well discharge any such superstitious forbidden Acts, as it pleases, under the pain of Witch-craft. Nor can these who are accused, complain of severity, since *sibi imputent*, that use these forbidden things against the expresse commandment of the Law; and therefore since the Law and Practick hath forbidden all Charms, it is most just that these who use the same should be severely punished, whatever the pretext be upon which they are used, or after whatever way or manner, or to whatever end, whether good or bad.

X. Albeit *per leg. 4. Cod. de mal. & Math.* these Magick Arts are only condemned, which tend to the destruction of mankind, but not these whereby men are cured, or the fruits of the ground preserved; yet I have oft-times imputed this constitution to *Tribonian*, who was a Pagan, and a severe enemy to Christians, or else that it behoved to be so interpret, or that thereby remedies, assisted by Godly Prayers, were allowed, else what mean these words, *suffragia innocenter adhibita*. But since I am informed from the Ecclesiastick Historians, as *Zozim. lib. 2.* that *Constantine* was not yet turn'd Christian when

when he past that constitution; but however this constitution is omitted in the *Basilicks*: and the Gloss sayes, that *αὐτὸν ἐν τῇ ἀποκρίσει οὐκ ἐλέγη*, it was not thought fit to be mentioned, in the repurgation of the Law: And that constitution was very well reprobated by *Leo's 65. Novel*. And by the Canon Law, *tit. de sorti-legiis*: And the general Sanction of the former Act of Parliament leaves no place for this distinction, Suitable to all which, *John Brough* was convict for Witchcraft, in *Anno 1643.* for curing Beasts, by casting white stones in water, and sprinkling them therewith; and for curing Women, by washing their feet with South-running Water, and putting odd money in the Water. Several other instances are to be seen in the Processes led in *Anno 1661.* And the instance of *Drummond* is very remarkable, who was burnt for performing many miraculous Cures, albeit no malefice was ever proved.

XI. Consulting with Witches is a relevant Ditty with us, as was found against *Alison Follie*, *per. Octob. 1596.* and this is founded upon the expresse words of the Act. The professing likewise skill in Necromancy, or any such Craft, is by the foresaid Act of Parliament a relevant Article. For the full clearing of which Act, it is fit to know that Divination was either *per demono-mantiam*, the invocation of Pagan Gods, or *Nangani-am*, which was the Prophecyng for invocation of some Sublunary thing. *Mangania* is divided in *Necromantiam*, which was a Prophecyng by departed Spirits, *Udromantiam*, which was a Divination by Water, &c. All which species and kinds of Divinations by any thing, is comprehended under the general prohibition of Necromancy, and such like Acts: So that Predictions and Responses by the Sieve, and the Shear, and by the Book, and all such cheats and species of Sorcery are punishable by death in this Act: Yet these forbidden practices may sometimes be excused by ignorance, or if it can be cleared by circumstances, that the user designed nothing but an innocent jest or recreation, *Delrio lib. 4. cap. 1. quest. 4.*

XII. The last Article in Criminal Libels useth ordinarily to be the being delated by other Witches, which the Doctors calls *diffamatio*, and we *common brutt and open fame*, which are never sustained as relevant, *per se*, but only joyned with other relevant Articles, as is to be seen in the foresaid Process of *Margaret Hutchison*, though I think that Interloquutor very severe, since if any of the former Articles be *per se* relevant, they need not the assistance of fame and delation. Sometimes likewise, but with much more reason, Articles that are of themselves irrelevant are sustained relevant, being joyned with fame and delation; an example whereof is to be seen in the 9th Article of the Inditement against *Fanet Cock*, *Septemb. 7. 1661*. In which Article she was accused for having recovered a Child by Charms, with the help of another Witch; which other Witch had confessed the same when she was confronted with the said *Fanet*: Likens both of them were found lying above the Child, whispering one to another, and the blood of a Dog was found standing in a Plate beside them; which Article was not sustained relevant *per se*, but was found relevant, being joyned with fame and delation.

XIII. The relevancy of this Crime being thus discussed, the ordinary probation of it is, by Confession or Witnesses, but the probation here should be very clear, and it should be certain that the person who emitted it is not weary of life, or oppressed with melancholly. 2. *Albeit non requiritur hic ut constet de corpore delicti*, this being a Crime which consists oft-times in *animo*; yet it ought to be such as contains nothing in it that is impossible or improbable. And thus albeit *Isobel Ramsay* did upon the 20. of *August 1661*, confess that the Devil gave her six pence, and said that God desired him to give it her: and at another time a Dollor, which turn'd thereafter in a *Slait-stone*; the Justices did not find this confession, though judicial, relevant. And to know what things are of themselves impossible for the Devil to do, or at least what is believed to be impossible, may be seen very fully treated of in *Delrio's* second Book,

where it is condescended that *succubi & incubi sunt possibiles, id est*, that the Devil may ly in the shape of a man with a woman, or in the shape of a woman with a man, having first formed to himself a body of condensed Air; and upon such a confession as this, *Margaret Lawder* and others were convicted. It is likewise possible for the Devil to transport Witches to their publick Conventions, from one place to another, which he may really do, by carrying them: and sundry Witches were in *Anno 1665.* burnt in *Culrofs* upon such a confession as this.

XIV. It may be, I confess, argued, that Spirits and immaterial substances cannot touch things material, and consequently can neither raise nor transport them: but if we consider how the Adamant raises and transports the Iron, and how the soul of man, which is a Spirit, can raise or transport the body; and that a mans voice, or a Musical sound is able to occasion great and extraordinary motions in other men, we may easily conclude, that Devils, who are Spirits of far more Energy, may produce effects surpassing very far our understanding. And yet I do not deny but that the Devil does sometimes perswade the Witches that they are carried to places where they never were, making those impressions upon their Spirits, and acquainting them what was done there, which is done by impressing Images upon their Brain, and which Images are carried to the exterior senses by the animal Spirits, even as we see the Air carries the species of colours upon it, though in a very insensible way: and thus we see likewise, that the fumes of Wine or Melancholy will represent strange apparitions, and make us think them real. Nor ought it to be concluded that because those Witches are only transported in Spirit, or in Dreams, that therefore they ought not to be punish'd, since none can be punished for dreaming; and that because those Witches desire to have these Dreams, and glory in them when they are awake, nor have any these Dreams but such as have entered into a preceeding pacton. I know that the Canon *Episcopi* in the Coun-

cil of *Anacir*, (or the *Aquilean* Council, as others call it) does condemn these transportations, as false and meer delusions, which are imprest upon the fancy of poor Creatures by the Devil, & *cum solus spiritus hac patitur, nec non in animo sed in corpore inveniri opinantur*, but that Act of that Council does not assert all transportations to be imaginary, and Dreams, but only declares those who thought they follow'd *Diana* and *Herodias* to these publick meetings, to be altogether seduced, for these indeed were seduced; for *Herodias* being dead long since, could not be at their meetings. But from that it is unjustly concluded, that there are no real transportations, there being so many instances of these transportations given, both in Sacred and prophane Story; and persons having been found wounded, and having really committed Murders and other insolencies, during these transportations.

XV. Whether it be possible for a Witch to cause any person be possesst, by putting Devils into their body, may be debated; and that it is possible, appears from the History of *Simon Magus*, and many others, and is testified to be true by *St. Jerome*, in the life of *St. Hilarion*. And since Witches have confessed that there are Devils who obey one another, and that there are different degrees amongst them; why may not those of an inferiour degree be forced, by vertue of a paction with those of a superior order, to possess men and women at the desire of Witches? Witches themselves have confessed that this hath been done. And I find by a decision of the Parliament of *Theodosius*, that Devils have been heard to complain in those that were possesst, that they were put there by the enchantment of such and such women: But upon the other hand, it is not to be imagined that Devils would obey mortal creatures, or that God would leave so great a power to any of them to torment poor mortals: And the Devil, who is a liar from the beginning, is not to be believed, in saying that he is put there by Inchantments; and though he make such promises to Witches, yet he does in these but cheat them: and if the Devil could posses

sels at pleasure, we would see many more posselt then truly there are.

XVI. The Devil cannot make one solid body to penetrat another, *Quest. 17.* and therefore I think that Article libel'd against *Margaret Hutchison*, of coming to *John Clark's* house, when doors and windows were shut, should not have been admitted to probation, since it is very probable they would have searched the house after the second or third nights fear; and she could not penetrat doors nor walls;

XVII. The Devil cannot transform one species into another, as a woman into a cat; for else he behoved to annihilat some of the substance of the woman, or creat some more substance to the cat, the one being much more then the other; and the Devil can neither annihilat or creat; nor could he make the shapes return, *nam non datur regressus à privatione ad habitum*: But if we consider the strange tricks of Juglers, and the strange apparitions that *Kercher* and others relate from natural causes, we may believe that the Devil may make a woman appear to be a beast, & *à contra*, by either abusing the sense of the beholders, or altering the Medium, by inclosing them in the skin of the beast represented, or by inclosing them in a body of air, shap'd like that which he would have them represent, and the ordinary relation of the witnessses, being wounded when the Beast was wounded, in which they were changed, may be likewise true; either by their being really wounded within the body of air in which they were inclosed, or by the Devils inflicting that wound really himself, which is *Delrio's* opinion. But it would seem hard to condemn any person upon the confession of what seems almost impossible in it self: And I cannot allow instances in the Journal Books, where poor creatures have been burnt upon such confessions, without other strong adminicles.

XVIII. The Devil may make Bruits to speak, or at least speak out of them, *Quest. 18.*

He can also raise storms in the Air, and calm these that are raised,

raised, *Quest. 11.* And yet it being libel'd against *Fanet Cock*, that she said to these who were carrying a Witch to be execute, *were it not a good sport if the Devil should take her from you*; like-as a great storm did overtake them when they were carrying her to the place, it having been a great calm both before and after; yet this Article was not sustained relevant, since it might have proceeded from folly, or jest, or *vana jactantia*:

XIX. The Devil may inflict diseases, which is an effect he may occasion *applicando activa passivis*, and by the same means he may likewise cure: A clear instance whereof appears in the *Marriage-knot*. And not only may he cure diseases laid on by himself, as *Wierus* observes, but even natural diseases, since he knows the natural causes and the origin of even these natural diseases, better then Physicians can, who are not present when diseases are contracted, and who being younger then he, must have less experience. And it is as untrue that *Divus Thomas* observes, who asserts that cures performed by the Devil cannot continue, since his Cures are not natural. And since he both may make sick, and may make whole, it follows that he may transferr a disease from one person to another. And I find that it being libel'd against *Margaret Hutchison*, that she took a disease off a Woman to put it on a Cat: It was alledged that this Article was not relevant; because, 1. *Una saga non potest esse ligans & solvens in eodem morbo*. 2. That in such transactions as these, the Devil never used to interpose his skill, except where he was a gainer; and therefore though he would transfer a disease from a bruit beast to a rational creature, yet he would never transfer a disease from a rational creature to a bruit beast; both these defences were repelled. Many Witches likewise confess that they cannot cure diseases, because they are laid on by Witches of a superior order, who depend upon Spirits of a higher degree.

Some think that they may innocently employ a Witch to take off the disease imposed by another, and lay it upon the Witch who imposed it, even as men may innocently borrow money:

money from an Usurer, to be employed for pious uses, or make cause an Infidel swear by his false Gods, for eliciting truth: and that in this manner Devils are rather punish'd then serv'd. But since all commerce with Devils is unlawful, this practice is justly reprobated by D, *Autun, p. 2. discourse 48.* But yet it is thought lawful to all who are bewitched, to desire the bewitchers to take off the disease, if it can be removed without a new application to the Devil, but only by taking away the charm; or it is lawful to any to remove the charm or signet it, if it be in their power, D, *Autun, pag. 825.*

XX. Witches may kill by their looks, which looks being full of venomous spirits, may infect the person upon whom the look, and this is called *fascinatio physica*, *sed fascinatio vulgaris qua dicitur fieri per oculos tenerorum puerorum vel parvorum porcorum vana est & ridicula*, Del. lib. 3. 2. 4. Sect. 1.

I know there are who think all kinds of fascination by eyes, either an effect of fancy in the person affected, or else think it a meer illusion of the Devil, who perswades Witches that he can bestow upon them the power of killing by looks; or else the Devil really kills, and ascribes it falsely to their looks; whereas others contend that by the received opinion of all Historians, men have been found to be injured by the looks of Witches: and why may not Witches poison this way, as the Basilisk doth? Or why may not the spirits in the looks affect as well as the breath? Or why may not looks kill as well as raise passions in the person lookt upon? Nor can it be denied but that blear'dness is begot by blear'dness; and that menstruous women will spoil a Mirrour by looking upon it. Likeas there seems even some ground for it in Scripture; *Deut. 28. 54.* it is said, *that a mans eyes shall be evil toward his brother.* And some likewise endeavour by consequence from *Matth. 20. 15.* *Is thine eye evil:* the word *Ragnum* signifying in Scripture both to bewitch and to envy. Some will think that St. Paul *Gal. 3. 1.* alludes to this received notion, but conjecture doth so much over-rule all this affair, that

where hard to fix crimes upon so slender grounds: And therefore though where Witches confess that they did kill by their books, their confession and belief may, if they be otherwise of a sound judgement, make a very considerable part of a crime, where it is joyned with other probabilities, yet *per se* it is hardly relevant.

XXI. It may be also doubted whether Witches can by amorous potions inchant men or women to love: and though it may seem that these being acts of the soul, cannot be raised by any corporeal means, yet *l. 4. c. de Malef. & Mathemat.* makes this possible, and punishable, *eorum scientia punienda, & severissimis merito legibus vindicanda, qui magicis accincti artibus pudicos ad libidinem de fixisse animos deteguntur*: But this Law speaks only of lust, and not of love, as I conceive. Nor can it be denyed, but that not only Witches, but even Naturalists may give Potions that may incline men or women to lust, and therefore the question still remains, whether Witches may incline men or women by Potions to a fancy and kindness for any particular person; and though Potions may incline men to madness, yet it doth not follow that therefore they may incline them to love. And though *D. Autun* doth bring many Arguments from History, and pretends that the Devil may raise and excite the old species of love which ly hidden in the body, and may thereby form a passion, yet these are too conjectural grounds to be the foundation of a criminal sentence. The *Bavicks* make the punishment of this to be deportation, and so applies the former Law.

XXII. Witches do likewise torment mankind, by making Images of Clay or Wax, and when the Witches prick or punish these Images, the persons whom these Images represent, do find extream torment, which doth not proceed from any influence these Images have upon the body tormented, but the Devil doth by natural means raise these torments in the person tormented at the same very time that the Witches do prick or punish, or hold to the fire these Images of Clay or Wax; which

manner

manner of torment was lately confess'd by some Witches in *Vernefs*, who likewise produced the Images, and it was well known they hated the person who was tormented, and upon a confession so adminiculate, Witches may very judiciously be found guilty, since *constat de corpore delicti de modo de linquendi & inimicitiiis praviis.*

XXIII. It is ordinarily doubted whether confessions emitted before the Kirk Sessions in this case be sufficient: But this I have treated more fully in the Title of Probation by Confession. Only here I shall observe, that *Christian Stewart* was found Art and Part of the bewitching *Patrick Ruthven*, by laying on him a heavy sickness with a black Clout, which she herself had confessed before several Ministers, Nottars, and others at diverse times; all which confessions were proved: and upon these repeated confessions she was burnt, *Novemb. 1596.* *Margaret Lawder* was convicted upon confession emitted before the Magistrats and Ministers of *Edinburgh*, albeit past from Judgment, *Decemb. 9. 1643.* see that Book of Adjournment pag. 349. And if the confession be not fully adminiculate, Lawyers advise that confessors should be subjected to the torture which is not usual in *Scotland*. And it is very observable that the Justices would not put *James Welch* to the knowledge of an Inquest, though he had confessed himself a Witch before the Presbytery of *Kirkcudbright*, because he was Mine when he confessed the Crime, and the confession was only extrajudicial, and that he now retracted the same; but because he had so grossly prevaricat, and had delated so many honest persons, they ordained him to be scourged and put in the Confinement-house, *April 17. 1662.* It was proved against *Margaret Wallace*, *March 20. 1622.* that she said that if it could be proved that she was in *Greggs House*, she should be guilty of all the Ditty; and therefore it being proved that she was in *Greggs House*, that probation was alledged by the Advocate to be equivalent to a confession, as was found against *Patrick Cheyn*: To which it was replied, that this could amount to

no more then a lie; and in my opinion, it could not have even the strength of an extrajudicial confession, but rather imported a denial of the Crime.

XXIV. The probation by Witness in this Crime is very difficult, and therefore *socii criminis*, or other confessing Witches are adduced; but though many of them concur, their depositions solely are not esteemed as sufficient, *ne vel ad pœnam extraordinariam imponendam*, though some think the same sufficient to that end, because of that general Brocard, *ex multiplicatis indicis debilibus resultare indicia indubitata*: But *Delrio* asserts, that the conjection of such testimonies is not sufficient, *Nunquam enim*, saith he, *quæ sua natura dubia sunt possunt facere rem indubitatam ut nec multa agrorum sanum nec multa non alba unus albus nec multa tepida unum callidum*. And that the testimony of one confessing Witch was found not sufficient to file the Pannel, is clear by the Process of *Alison Follie*, who was assilzied pen. Octob. 1596. Albeit *Fanet Hepburn* another Witch confess that the said *Alison* had caused her bewitch *Isobel Hepburn*, whereof she died; but though VVitch-craft cannot be proved *per socios criminis*, though dying and penitent VVitches, yet it may be doubted if the consulting VVitches may not be proved by two VVitches who were consulted: for if this be not a sufficient probation, it would be impossible to prove consulting any other manner of way.

The persons to whom the injuries are done by the VVitches are admitted to be VVitneses: thus *Katherine Wardlaw* was admitted against *Margaret Hutchison*; but somerimes they are only admitted *cum nota*, if the probation be not otherwise weak, and thus *William Young* and *Agnes Hutchison* were only admitted *cum nota* against *Beatrix Leslie*, August 1661. And in that Process likewise they received only *Agnes Ross cum nota*, because she was the Mistress of the two VVomen who were maleficiat. *Neilson* was admitted to be an Assizer against *Margaret Wallace*, though he was Brother in Law to *John Nicol*,

who had given information for raising the Ditty, because the Ditty was not at *Nicols* instance; and yet *Starling* was set from being an Assizer, because *Moor* who was alledged to be one of the persons maleficiat was his Brother in Law. *March 2, 1622.* *Dickson* was there likewise admitted to be an Assizer, though he assisted the Bailie in taking her, which was found the office of a good Citizen, and though he had deadly tead against her Husband, since it was not proved he had any against her self.

Women are received Witneses in this Crime, as is clear by the Proceß against *Margaret Wallace*, and all the Processes in *August 1661*. The not shedding of tears hath been used as a mark and presumption of Witch-craft, *Sprenger. mal. malef. p. 3. q. 15.* because it is a mark of impeniteace; And because severall Witches have confest they could not weep: But the being accused of so horrid a Crime may occasion a deep melancholly; and melancholy being cold and dry, hinders the shedding of tears: and great griefs do rather astonish then make one weep.

XXV. The punishment of this Crime is with us death by the foresaid Act of Parliament, to be execute as well against the user as the seeker of any response or consultation, & *de practica*, the Doom bears, to be worried at the Stake, and burnt.

By the Civil Law, Consulters were punished by death, *l. 5. C. de malef. & mathem. nemo aruspice consulat, aut mathematicum nemo ariolum, angurum et vatum prava confesio nonticeat sileat omnibus rer petuo, divinandi curiositas.* In which Law, Fortune tellers are also punishable: though with us, dumbe persons who pretend to foretel future events, are never punished Capitally. But yet I have seen them tortured, by order from the Council, upon a representation that they were not truly Dumb, but feigning themselves to be so abused, and cheated the people. The foresaid Law is renewed

in the *Basilieks l. 31 h. s.* μηδεις ερωτατω τινα μαντικην εν αγυλλα-
μενον οι δε χαλδαοι και οι μαγοι μηδε εν αυταις ταϊς μαντειαις εαυ-
των παρεχονταν, αλλα δε κεφαλικη τη διδ οι δηνον τιμωρια υποκεισθαι.
But *Farin.* and others thinks, that where no

person is injured, death should not be inflicted; and that imprisonment and banishment is now practised by all nations in that case, *Lib. 1. Tom. 3. quest. 20. Num. 89. & Clarus. S. hereis num. ult.* But *Perezeus* thinks this too favourable a punishment except the users of these curious arts were induced thereto, out of meer simplicity, & *sine dolo malo*; but with us no such distinction can be allowed by the justices, who must find all libels relevant, which bear consulting with Witches, and that Ditty being proved, they must condemn the Pannel to die; albeit I think the Council may alter the punishment, if it be clear that the user of these acts had no wicked designe nor intercourse with the Divil therein.

XXVI. By the Law of *England* Witch-craft was of old punished sometimes by Death, and sometimes by exile; But *r. Fac.* this following Statute was made, which I here set down, because it is very special.

If any person or persons shall use, practise, or exercise invocation or conjuration of any evil and wicked spirit, or shall consult, covenant with, entertain, employ, feed or reward, any evil or wicked spirit; to, or for, any intent or purpose, or take up any dead man, woman, or child, out of his, her, or their grave, or any other place where the dead body resteth, or the skin, bone, or any part of a dead person, to be employed or used in any manner of witch-craft, sorcery, charme, or incantment; Or shall use, practise, or exercise any witch-craft, incantment, charm or sorcery, whereby any person shall be killed, destroyed, wasted, consumed, pined, or lamed, in his, or her body, or any part thereof: that then every such offender or offenders, their aiders, abettors, and counsellors, being of any the said offence, duely and lawfully convicted: and attainted, shall suffer pains of death, as a felon, or felons, and shall

lose the priviledge, and benefit of Clergie, and Sanctuary If a ny person, or persons, take upon him or them; by witchcraft, enchantment, charm, or sorcery, to tell or declare, in what place any treasure of Gold, or Silver, should or might be found, or had in the earth, or other secret places: Or where goods or other things lost, or stoln, are become: Or whereby any cattell or goods of any person, shall be destroyed, or to hurt or destroy any person in his, or her body, albeit the same be not effected or done; being therefore lawfully convicted, shall for the said offence suffer Imprisonment by the space of a whole year, without baile or mainprise. Once every quarter of the year these Mountebanks are to mount the pillory, and to stand thereupon in some Mercat Town six hours, and there to confesse his or her error, and offence.

TITLE

T I T L E X I.

Murder.

1. *The Etymologie of Murder.*
2. *Self defence defined, and whether it be punishable.*
3. *How moderation in self defence is said to be exceeded.*
4. *How self defence must be proponed.*
5. *How it ought to be proved.*
6. *What is casual homicide.*
7. *Whether he who was doing what was unlawful, may defend himself as only guilty of casual homicide.*
8. *Whether he who is only guilty of casual homicide may be fined.*
9. *What is homicidium culposum, or faulty homicide.*
10. *What wound is to be judged mortal.*
11. *How the designe of Murdering or forethought felony, is to be cleared.*
12. *Homicidium in rixa when many are conjunct actors, how punishable.*
13. *The killing of thieves, or such as resist authority; how punishable.*
14. *Whether it be lawful for a father to kill his own daughter, if he find her committing adultery.*
15. *Assasination, how punished.*
16. *Murder under trust, how punished.*
17. *What is art and part of Murder.*
18. *How such as kill in the execution of law, are punishable.*
19. *Whether it be lawfull to kill a Rebel.*
20. *The life-rent escheat of murderers falls in some cases.*

21. *Murder is one of the pleys of the Crown.*
22. *How Sheriffs and other Judges ought to prosecute murderers.*
23. *Whether remissions can be granted in case of murder.*

GOD Almighty did to the honour of impressing man with his own image, add as a second obligation, a natural horror in every man to be in any accession to the detaceing it; so that he has consulted his own glory, and our security, joyntly in these severe laws which he has made against Murder. And his divine finger is not seen so apparently, in any discovery, as in that of Murder: and it is very remarkable, that these *Barbarians*, who saw the viper fasten upon *Pauls* hand, did instantly conclude him guilty of Murder, because he was (to their apprehension) so miraculously punished.

I. *Murder* comes from the Dutch word *Moorde*, which signifies, *cadem ex jussidiis vel proditorie factam.* *Math. h. 1.* And Murder is properly different from Slaughter, the one being committed *per feloniam*, the other *per infortunium*, *Leg. Male. c. 2.* And therefore when our Law forbids killing under trust, *Fa. 6. Pa. 11. ch. 81.* It calls it murder under trust. But when it speaks of killing by accident, or in self-defence, it calls it Slaughter, or Homicide. *c. 22. Par. 1. K. Ch. 2. Ses. 2.* And by this it seems that this crime is better writ murder than murder, though murder be the ordinar way of writing it, especially in our old Law.

The Civilians define Murder to be the killing man by man unlawfully. And they divide it into that which is committed casually, in defence, culpable, or wilfully.

II. *Necessarium Homicidium*, or homicid committed in self-defence is when a man being pursued or reduced to inevitable necessity, has no way left him to evit his own death, but by killing

ling the Aggressor: This is in law called *in culpa tutela*, or *moderamen in culpa tutela* within which moderation, if the defender contain himself, he is no way punishable, but if he exceed the same, yet so favourable is self-defence, that the exceder is not lyable to the ordinar punishment, but is ordinarily punishable according to the excess, at the discretion of the Judge. With us likewise self-defence is only punishable at the arbitrement or discretion of the Judge by the 22. *art. Seß. 1. Pa. 2. K. Ch. 2.* But seeing that act ordains it to be punisht at his discretion, it may be doubted if in all cases self-defence be not some way punishable. And I remember that Captain Barclay being assylyzied in Decemb. 1668. Because the Assyse found that the killing Sinclar was in his own defence, the pursuers were to petition the Council (which is the ordinar way of taxing arbitrary punishment in this case) that he might be fined. And very learned Lawyers, were of opinion, that self-defence was in all cases punishable, though attended with the most favourable circumstances of innocency, from whom I differed upon these reasons, 1. By the Civil Law and the opinion of the Doctors, if the defender contain himself exactly within that moderation, he is no way punishable, as is clear by *Farin. part. 74. quest. 25. part. 6. 2.* Self-defence is a duty, and so not punishable, for it were against reason that the Law should punish what it doth command. 3. The Law sayes that *omni culpa caret qui se defendit*, and in our Law it is called *murthrum justum. leg. Malcol. 6. 11.* and so to punish him who necessarily defends himself, were to inflict a punishment where the Law acknowledged there were no guilt. 4. It should be in the power of every malicious rascal to wrong the most innocent, for either he behov'd to suffer himself to be killed, or to be punished by defending his own life: And by the said act, it is only declar'd leifsum to punish, but not necessary. And yet by the Law of England, Murderers *se defendendo* forfealt their movables, and both in that and in murder, upon misadventure (for so they call casual homicide)

micide) the murderer must have a pardon, *Statute 6. E. 1. cap. 9.* So great a regard, sayes *Bolton*, the Law hath to the life of a man, *cap. 15. num. 16.* And by the Law of *Savoy* he who kills, though in self-defence, needs a pardon, but the Prince in that case cannot refuse to grant a pardon. And therefore their Lawyers call that pardon *gratia justitie*, *Cod. fabr. lib. 9. tit. 10.* but with us, no pardon is requisite, albeit it is most ordinar to take remissions in such cases, bearing self-defence in their narrative.

III. This moderation is said to be exceeded in these three, *vic.* in Armes, 2. In time. 3. In the measure of following, striking, &c. This moderation is exceeded in Armes, as if the aggressor have only a staff, and the defender wound him with a sword or pistol; the defender is in that case punishable, for there were no reason in that case the defender should have had any fear of his life, *nec erat in dubio vita constitutus*. And yet this conclusion is not infallible, for if the defender was much weaker then the aggressor, he might be excused to use such unequal Weapons. The defender is said to exceed in time, if he strike the aggressor, *ante quam sit in actu proximi occidendi*, for else it should be lawful to every man, upon the first apprehension of fear, to kill the aggressor, which were very dangerous: and here it may be doubted, if when any aggressor threatens to kill, if the defender who knows not when the threat may be put in execution, may immediatly kill. There are probable reasons to be urged for either opinion: And albeit the punishment should in this case depend upon the arbitrement of the Judge, yet if the aggressor be known to have any designe to Murder, or be a person who uses to execute what he threatens and if he have a Sword, though not drawn, or a Pistol, though not cockt: (For if he have either of these, there is no doubt but he may be lawfully killed, because he is *in actu proximi offendendi*, and no man should wait till he be killed) I think that though the aggressor be killed, yet the defender hath the benefit of self-defence; and albeit he may be arbitrarily punished, yet

he cannot be punished with death: and many Lawyers are of opinion, that he who threatens to kill, may be killed, which opinion they found upon these reasons, 1. Because the Law looks upon that which is unlawful, as done, if it was intended to be done, and that *in odium* of him who designs what is unlawful. 2. There is greater fear from some threats, then from wounds; and therefore, seeing it is lawful to kill these who assault us with wounding, why not, and him who threatens? 3d. per. l. 1. C. *quando licet cuique*, &c. *Mortem inquit impetrator quam minabatur accipiet & id quod intendebat incurrat*, nor can the friends of the threatner complain, seeing the aggressor was in effect author of his own death, And it is clear that the defender had no design to kill. Yet the Justices would not sustain, *mina per se*, to be a sufficient qualification of self-defence, but sustain'd it jointly with the aggressors tying a Pistol, though it mis-gave, and though the defender might have fled, *January 1668. Sinclair contra Barclay*. And albeit by the Canon Law, *insultatus debet fugere*. And that by the Law of England, he who is invaded, is obliged to flee as far as he can, as to a Wall or Ditch, *Bolt. cap. 15. num. 7*. Yet by the opinion of the Civilians, a person invaded is not obliged to flee far, *Farin. quest. 125. P. 2*. It may be probable, that if the defender was alone in a House, or place with the aggressor, and could expect no help, that upon threatening or other probable designs laid against his life, he may kill the aggressor; and from which may be deduced, that the *actus proximus* which Lawyers speak of, must not be interpreted, only the having a Sword drawn; for if a stronger man have a weaker in a lockt house, and threaten, he may kill him, though asleep, if he cannot otherways escape.

The defender is said to exceed in the measure; also if he killed him for wounding, whom he might have shun'd: or if he followed the aggressor, which though it be not fully lawful, yet *fugientem persequens dumodo in ipso actu non punitur* *ana ordinaria licet occiderit*, *Boer. decis. 168. Novemb. 7.*

And

And albeit much be left to the arbitration of the Judge, as to all the three, *arma tempus & modus*: yet the general rule is, that if the defender exceed only in either of the three, as, *o. g.* in the armes, or time, the excess is said to be *culpa levisissima*, and no way punishable: if in two of these, as in time and armes, then it is accounted *culpa levis*, and is somewhat punishable but if the defender exceed in all the three, as in time, armes, way of prosecution, then it is *culpa lata*, but yet he is not punishable, as if he had *dolose* Murdered, for though it be a rule *in civilibus* that *culpa lata equiparatur dolo*: Yet it is a rule *in criminalibus* that *culpa lata numquam equiparatur dolo ubi agitur de pena corporis afflictiva* *Far. quest. 125. part 6.* It is also controverted amongst Lawyers, if seing honour is as dear as life, it be lawfull to kill him who asperges our honour, as it is lawfull to kill him who assaults our life. And albeit *Farinacius* be of the judgement, that he who is thus provokt, being a person of far more eminent condition, then the injurer killing him is not to be punisht as a Murderer, *sed pena extraordinaria licet injuria sit verbalis*; yet in my judgement he errs in that position; for in effect, that is not self-defence (because the verbal injury cannot be retreated, nor retain'd) but in revenge: yet *dolor justus aliquando operatur ut pena ordinata temperetur*, *Boer. decis. 237.* but yet that is not allow'd in killing, and such other injuries, *qua non possunt revocari*, *Gothof. prax. crim. §. homicida, N. 25.* and albeit this hold in verbal injuries offer'd to our Honour, *ubi nescit vox missa reverti*, yet if the injury offer'd to our Honour be real, and such as may be stopt, as by commanding an eminent person to loose down his Breeches to be whipt, or do any most ignominiously & vile Act to the aggressor, in that case, I should think that the killer should not be capitally punisht, albeit he was in no hazard of his life. I likewise think that the fear of imprisonment by the defender, may excuse from capital punishment seing Liberty is as dear as Life; and no man can be secure of his Life, if he be unjustly imprison'd, & *sibi imputet aggre-*

for qui occasionem prahuit. It is likewise lawful to kill such as would murder our Friend, or fellow-traveller, which is accounted lawful, though not self-defence, which is extended also to the defence of all others, because we should love our Neighbour as our selves. And it is lawful to kill a Thiet, who in the night offers to break our Houses, or steal our Goods, even though he defend not himself, because we know not but he designs against our Life: and Murder may be easily committed upon us in the night: but it is not lawful to kill a Thief who steals in the day time, except he resist us when we offer to take him; and present him to Justice.

IV. This exception of self-defence, must be propon'd against the revelancy, and must be condescended upon, thus the Pannel no ways acknowledging the killing; yet if he killed, it was done in his own defence, in swa far as the Defunct drew a Sword, and thrust, or offer'd a Pistol, &c. And the Justices will not allow that it should be propon'd to the Assize, as I have oft heard this press'd, but very unreasonably; for this concerns the relevancy, to which the Justices, and not the Assizers are only Judges competent: And it were very dangerous to refer to ignorant Assizers, Matters of such importance, and which are oft so intricat *in fure*. And whereas it may be urg'd, that Art and Part is referred to the Assize, and is not condescended upon, and made relevant. It is answered, that the accuser cannot know the confession of the Pannel, till the Witnesses first condescend upon it: but the Pannel cannot but know all the circumstances of his own self-defence, and is not to learn that from others: But yet though the proposer of a defence, do's *in civilibus* acknowledge *eo ipso* the Lybel: yet *in criminalibus*, though the defender, or Pannel prove not his exception of self-defence, he will not be condemned, except the pursuer prove the Lybel.

V. The way of proving this self-defence, was by raising a precept of exculpation, but is now only by a summons, which expresses not so particularly the defence in all its circumstances, but that it may be hereafter help'd, which it seems is unjust, for the Pannel should know what himself did: nor should a Judge grant a precept for exculpation, till he see that there be some ground for craving it. *

This exception of self-defence is so favourable, that it may be prov'd by presumptions, by Witnesses, otherways decidable, as Confess, Servants, and Witnesses who depone only upon credulity; and the Defence it self being once prov'd it is presumed that it was done necessarily, and lawfully, *potius ad defensionem quam ad vindictam* Far. quest 115. part 7. §. 1. And yet our Law allows no Witnesses to be receiv'd in defence, but such as it allows pursuits and witnesses led in defence, are more to be suspected; for men are naturally inclin'd to go all lengths in bringing off the Pannel; and for this cause it is, that we have Assizes of Error against such as absolve a Pannel: but none against those who condemn him.

Before this Act of Parliament, self-defence was still restrain'd by the Justices, to elide the Lybel of Murder, but it was oft ineffectual, seeing there were no precepts of Exculpation then us'd; and consequently, except either the Pannel could have prov'd the *inculpata tutela* by the accusers own witnesses, who were led to prove the Murder (which was not secure, seeing these who saw the beginning of the scuffle, and first aggression, might have been absent when the aggression was killed) or that the witnesses would have voluntarily appeared (which was a probable reason to set them, they being *eo casu testes ultronii*) the defence could not have been prov'd, Whether self-defence will defend, or is lawful in *Paricidia*. See more of this Title Exculpation.

VI *Homicidium casuale*, is when a man is kill'd casually, without either the fault, or design of the killer, as if an Ass

head should fall off, and kill a by-stander: or a Rider should kill with his Horses feet: In which case our Law appoints, that if the prejudice be done by the Horses foremost feet, then the Ryder shall be forc'd to satisfy for the prejudice done: and these satisfactions are called *Croo* or *Galnes*; but where it is there said, that he shall give *Croo* or *Galnes*, as if he had killed him himself; it is to be interpret, not as if the Rider should be punishable in that case, as if he had killed him with his own hand: but that the Assythment shall be the same. But the Rider is not lyable at all for what prejudice is done by the Horses hinder feet, *lib. 4. Reg. Maj. C. 24.*

Casual Slaughter, or homicide, then is that which is occasioned by mistake and just ignorance, for if it proceed from affected ignorance; as for instance, if a man will not know what he may know, his ignorance in that case will not make the Murder following upon it, to be constructed casual homicide; but if it proceed from gross and *supina ignorantia*: it may be punishable by an extraordinary, or arbitrary punishment, but not by death. And since such ignorance is a fault, the Murder occasioned by it becomes *culposum*, or faulty homicide; as seems to me clear by *C. continebatur & c. lator de homicid.* It is then necessary, that the committer us'd all exact diligence to evite the Crime, else he is not in the case of casual homicide. Further instances whereof, are, if a Mason before he throw down Stones, advertise all below, though in throwing he kill, he is to be cleared as innocent. Or if a Hunter shoot at a Beast, but a man come in the way and be killed: and yet if either the Mason cry not, or if the Hunter did shoot in a place where people use to be, he is guilty of faulty Murder, in these cases which shews clearly the difference betwixt these two kinds of Murder.

VII. If the killer be employed about a thing unlawful, either in it self, or unlawful to the actor, the murder ensuing is thought still casual Murder, since Murder was not design'd, if

if the committer did exact diligence to shun all Murder; as for instance, to cary Guns is unlawful with us: and to hunt is unlawful to Priests by the Canon Law. If then a man having a Gun illegally, should lay it up securely: or a Church-man should kill a man, whilst he did shoot at a Beast in a remote place; these Acts would not infer Murder, because there was no Act done there, with relation to Murder, *Covar. ad clement. si furiosus*, and yet the committer, *versatur in actu illicito*. But yet others are of opinion, that if the committer be doing what is unlawful for him, he commits murder, *Tho. Aquinas 22. quest. 69. Act*: because he do's not at all that he ought to do in that case, to evite Murder, since what he do's is unlawful: But I think they may be thus reconciled, *viz.* if the committer do what is against the Law of Nature: or what is criminal, he should be lyable: or if what he do's, may probably produce ill consequences, and Murder, though he design'd not the same: in all which cases he ought to be lyable. And it seems to me reasonable, that he who Killed, when he was doing what was unlawful, may be arbitrarily punished, though he did exact diligence to shun Killing.

VIII When *homicide* is casually committed, some think that because there is no design to kill, therefore the killer ought not to be punished. Others think him lyable to an arbitrary punishment, or fine, & *quod Wergeldum solvere tenetur. Wesemb. para. ad l. Corn. de Sicar. num. 27.* A third Sect of Lawyers distinguish so, that if there proceeded no fault in the committer then he is lyable in no fine, or to no punishment: but that he is, if any fault of his preceeded. But it seems that if any fault preceeded, the Murder is not casual, but is *culposum*, and so the distinction meets not the state of the question: as it seems to me. that by *lib. 1. S. 3. ff. ad l. i. Cor. de Sicar.* a casual *homicide* deserves some punishment. And since some Lawyers think, that Murder in self-defence excuses not from all punishment: much less ought casual Murder, since self-

Defence wants not only a design to Kill, but is a duty in it self.

IX. *Homicidium culposum*: or faulty Slaughter, is where the Murder was not design'd; and yet it was committed meerly by accident, as if one should hound a Dog at another, who should bite him at whom he was hounded, so that he should dy thereby; or if one should strike with a Batton, when he had a sword; in these and the like cases, the offender is to be punished arbitrarily: but because *aberat animus occidendi*, this is not properly Murder, and so is not punishable by Death; but is punished according to the quality of these circumstances, which attend the Fact.

For clearing this difficulty, the Doctors say, that either the Killer is guilty only of *culpa levis*, *aut levisima*, and in that case he is no way punishable; nor is there any difference, *inter homicidium casuale & homicidium per culpam levem aut levisissimam commissum*, and this was found in the case of *Nicolson*, who being pursued for Murder, it was alledged that it was but *homicidium casuale*, or *culposum*, for in struggling, his Gun being a half-bend, went off; nor knew he ever the Defunct, and so could have no malice against him. To which it was replied, that the carying of Guns is forbid by the Law; and he the Defunct was *in actu illicito*: nor should he have carry'd a Gun which used to go off, & *versans in actu illicito nunquam excusatur*: which reply the Justices repelled, *June 24. 1673.* For they thought that the Law against wearing Guns, was in Desuetude as to Fowlers, whose trade it was, & *omni culpa caret qui facit id quod omnes facere solent sed si sit lata culpa*, it is to be punished arbitrarily, but not by death, *nam lata culpa nunquam equiparatur dolo ubi agitur de pena corporis afflictiva.*

X. Since the design of Killing depends much upon the nature of the Wound given, Lawyers conclude, that where the Wound was not deadly, or *vulnus lethale*, as they call it, the inflictor of the Wound cannot be punished, though the Par-

ty wounded thereafter died. And though some Lawyers be of opinion, that if the Party live three dayes after the receiving of the Wound; the Wound is thereby presumed not to be mortal, *Accurs. in l. 1. C. de emendat. serv.* yet generally this is referred to the arbitrement of the Judge; who is in this to follow the opinion of Physicians, or of one Physician, if more were not present: but if they vary, then the Judge should encline to punish, not by death, but by an extraordinary punishment: for Murder is not to be inferred, but from a concluding probation, *Gail. observ. 111. lib. 2.* and if the Wound be but small, and a Fever follow, then it is presumed that the Party dyed rather of a Fever, then of the Wound, especially if the Person wounded walked a foot for forty dayes *Gomes Var. resol. lib. 3. cap. 3.* And yet in December 1666, M^r. William Somervel was found guilty of the Murder of B^{ea} Rentoun, though it was alledged that the said Bailzie got only a Wound with a Batton, that she never took bed, but travelled five Miles that night a foot, and served as an ordinary servant eight moneths thereafter, till she died of a Fever with which her brother infected her: all which was repelled, because this alledgance was contrair to the Libel: wherein was expressly lybelled, that the Wounds were mortal; and though, where the Wounds are not lybelled expressly to be mortal, such a defence might be admitted. And the Judge ought to consider *intervallum temporis*, or *supervenientia febri*; yet these, nor no presumptions ought to be received, where the Wounds were offered to be proved to be Lethal: but this Decision was so ill liked, that the Council recommended M^r. William to His Majesty, who granted him a Remission. And since Judges may be so arbitrary in so great a concern, I should wish that the various periods of Nature, in cures, and the various determinations of Judges, were, as in the Criminal procedor, fixed to some certain time. And therefore, seeing ordinarily Wounds that are mortal, do kill the receiver in forty dayes, I wish that it were therefore gene-

rally concluded, that he who dies thereafter, dies not of his Wounds, if he has walked a-foot till that time, *vid. Zack. Quest. Medicolegal*: But by the Law of *England*, if the Person Wounded die within year and day after his Wound, it is presumed he died of his Wounds, *Cook* p. 53.

There was another Decision upon this Subject, the 13. of July 1674. *James Mason* being pursued for killing *Ralsoun*, alleged that he could not be guilty of Murder, since *Ralsoun* followed him all that day from house to house, and having at last put violent hands in the Pannel, he was forced to throw him off him, and his Head fell upon a Stool and bled; which Wound he took no pains to cure, but stayed in the Streets in the night time: and though the Wound was found not to be mortal by the Chirurgians, yet by cold and drinking, he killed himself, *ex malo regimine*; and when it was replied, that this could not amount to self-defence, since the killer was not in *periculo vite constitutus*: it was duplyed, that the violence done, was proportionable to the violence offered by the Aggressor, and so exceeded not *moderamen inculpata tutela*; for the said Pannel struck not him with any mortal Weapon, but only gave him a thrust with his hand, which was necessary to throw the Defunct off him. Upon which debate, the Justices sustain'd the Libel, only to infer *panam extraordinariam*; and remitted also the Pannels defences of casual Homicide, self-defence, and that the Wound was not mortal, to the knowledge of the Inquest.

XI. It is here controverted, whether he who intended to kill one, by a mistake killed not him, but another, be punishable as a Murderer; seeing as to the person killed, the Murderer had no design: yet I think he should die, seeing the design of killing a man, and not any one particular man, is Murder; and the killer intended to deface God Almightyes Image:

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and to take from the King a Subject. And I find that this is determined to be Murder by *Bolton*, cap. 11. num. 24. by whom likewise it is given as a rule, *nihil interest utrum quis occidat an acausam mortis praebeat.*

And thus a Son for having carryed his Father (being sick) in a frosty night, from one Town to another, was executed as a Murderer, because the Father died. And a Harlot having exposed her Child in an Orchard, where a Kite killed it, was execute as a Murderer, also & *ibi voluntas reputatur pro facto*; And if this were not Murder, this Crime might be Palliated under other shapes.

This Defence, viz. that the killer had no design to Murder, is a Negative, and so can only be proved by presumptions, as if there was no deadly feud formerly amongst the Parties. 2. If the Parties were Kins-men or intimats. 3. If the killer struck with a Staff, having a Sword or Pistol, or having these struck only with the hilts of his Sword, or with the head of his Pistol: and generally it is rather presumed to be *homicidium culposum*, then *dolosum* & *premeditatum nam nunquam praesumitur dolus.*

By our Law, Slaughter and Murder did of old differ, as *homicidium simplex* & *premeditatum*, in the Civil Law; and Murder only committed, as we call it, upon *fore-thought felony*, was only properly called Murder, and punished as such, *K. Fa. Par. 3. cap. 1.* where it is Statute, that Murder is to be capitally punished: but *Chaudmella*, or Slaughter committed upon suddenly, shall only be punishable according to the old Laws, *vid. Acts 95. 96. Par. 6. Fa. 1. & 22. Par. 4. F. 5. & 35. Par. 5. Fa. 3 & Act 31. Par. 6. 2 M.* The old Laws to which these Acts relate, are Statute, *William c. 5. Stat. Alexander c. 6. Stat. Rob. 2. c. 9.* in which it is declared, that Murderers who are guilty of *fore-thought felony*, shall not have the priviledge and advantage of refuge in the Girth: but that such as are guilty of *Chaudmella*, or

casual Slaughter, shall be sheltered in the Girth. Yet I find that none of these are in any other old Statute, to determine punishment of casual Slaughter, but that it was not punishable as Murder; is clear by the opposition. And in all our Laws, betwixt single Slaughter, and fore-thought-fellony: all casual Slaughter was of old comprehended under the word *Chaudmella*, which is a French word: *Chaud* signifying Hot, and *Mesler* signifying to mix. But in effect, this *Melleum* answers properly to *rixa* & *homicidium*, in *rixa commissum*, which is but one species, *homicidii non dolosi*.

XII. By the late 22. *Act Parl. 1. Ch. 2. Sess. 1.* It is Statute, that casual Homicide, Homicide committed in self-defence, and Homicide committed upon Thieves, shall not be punished by death. And seeing this Act mentions not Homicide, committed in *rixa*, or *homicidium culposum*: and seeing *homicidium culposum* differs from casual Homicide; it may be doubted, if under the one, the other may be comprehended: and it may be urged, that casual Homicide is in this Act a general term, comprehending all Homicide, which is not committed by fore-thought-fellony, because what is not designed is casual, and what is not fore-thought is casual: and the Doctors do use the Word Casual oftentimes in this general sense; as is clear by *Gothofred prax. crim. hoc. tit.* And by the rubrick of this Act, which bears an *Act concerning the several degrees of casual Homicide*. It appears that the word *Casual*, is taken there in a Lax Signification: albeit I confess, that the inscription is most improper; seeing Homicide in self-defence, and Homicide committed upon Robbers, are not Species of casual Homicide: but whether Homicide in *rixa* be comprehended under that Act, was contraverted in *William Douglas* case: and by that Decision it is clear, that in our Law, though Murder was not at first designed: yet if it was designed the time the stroke was given, the killer is

guilty of Murder: that premeditation is requisite to make Murder Capital, being only such as *antecedit actum licet non congressum*.

The Civilians in the case of *Homicidium per plures commissum*, state three questions; The first is, where the Murder was committed upon fore-thought felony, and then indefinitely, all the assisters are punishable by death. The second is, when it is not certain, but it is only suspected, and presumeable that it was deliberately committed, and then all may be tortured; but if they deny the design, they are all only punishable by an arbitrary punishment, because of the uncertainty. The third is, when the Murder was certainly committed, *in rixa*, or tuzlie; and then either the author of the Pley is certainly known, and he is punishable by death, in the rigour of the Law, Albeit many Lawyers are positive, that no Countrey uses this rigour; I remember that in *William Douglas's* case, this was urged: for there several Gentle-men having made a quarrel, which was only proved by one witness, they went to the Fields of *Lieth*, and *Hoom of Eccles*, was killed, but it was not proved who was the killer: and the quarrel was only proved by one witness; who likewise proved, that *Spot* had the quarrel with *Eccles*, and that *William Douglas* had none; and yet the Assise found *William* guilty, and he thereupon died because present.

XIII. Homicide likewise committed upon Thieves, and Robbers, breaking houses in the night, or committed in time of masterful deprivations, are free from punishment, by the foresaid Act 22. And albeit it be declared lawful to the Justices, to fine such as are assilzied from Murder; upon the defences of casual Homicid, and Homicide in defence: yet such as kill Robbers, or night Thieves, are free from all arbitrary punishment. By this Act likewise, it is lawful to kill such as assist, or defend the depredators, or oppose their pursuit by force; and by the 6, Act of the second Session of that

Parliament, it is Statuted, that the Parties whose goods are robbed, shall acquaint the Sheriff, or Justices of Peace, of the Paroch, who shall require all Parties to concur; and if any of the concurreurs, kill any of the Robbers, they are declared free; upon which it may be doubted, if such as kill Robbers without acquainting the Sheriff, or Justices of Peace, are punishable: and it seems they are, seeing this Act explains the other, and modifies somewhat the indefinite power given to private persons, who upon pretence of such invasions, which might prove very dangerous: and therefore the last did wisely require the concurrence of the Magistrate; and upon this consideration, I know that it was consulted, that notwithstanding of this, such as had not acquainted the Sheriff, or Justices, could not be exculpat. And yet it may be argued, that this Act narrates not the other, nor bears expressly a justification of it; but, without lessening the privilege therein granted, adds a new one, and so being introduced in favours of possessors, should not be interpret to their disadvantage. By the Civil Law, *licebat nocturnum furum occidere*. And by the 227. *Act* 14. *Par. Ja. 6.* it is declared lawful for the Leidges to convene, and execute Thieves, and they are all made Justices for that effect; upon which Act, a defence was propon'd, for the inhabitants of Kintail, who took a Robber, and execute him by their own authority, in a formal Court. But by the Civil Law, and Doctors, it was not lawful, *furem vel predatorem diurnum occidere*, except the thing stoln was of great value, and could not be otherways recovered; or that he defended himself, and resisted his being apprehended: all which defences may be proved, by the assertion of the killer, *Farin. 125. part. 4.* And if any other Probation were requisite, the benefit of these Acts were a snare, rather than an advantage: and necessity legitimates many things, which are otherways hard.

XIV. By the Civil Law, it was lawful for the Father to kill his own Daughter, if he found her committing adultery, and to kill also her adulterer. *l. part. 1. ff. de Adult:* which was allowed, rather in hatred to adultery, then because the Law considered it was too hard for a Father to restrain his passion in that case; for it it had been allowed to the father only upon this last accompt, it had been allowed much more to the Husband to kill his wife, if he found her committing adultery; for his relation being nearer, and his honour more concerned then the Fathers, his passion behov'd to be also more violent; and yet the Law being jealous of the Husbands violence, does only allow the Husband to kill the adulterer, if he be a mean person, but if the adulterer be a person of quality, or if the adulterer be found elsewhere then in the Husbands own house, it is not lawful to kill them, for the injury is heightened by polluting the Husbands own house, and becomes a kind of adulterous Hamsuckin: And yet if the Husband kill in either of these cases, that Law ordained the husband only to be punished by some arbitrary punishment, but not by death. *l. Marito. ff. de Adult.* But this last determination doth not satisfie justice for it seems reasonable that it should be rather lawful to kill a person of quality, committing adultery, then a mean person both because adultery is more ordinar amongst them, as having more ease, and being more luxoriously fed, and because the husband cannot be so easily presumed to have had former quarrels with a person above his rank, and so should be believed to have killed him meerly to satisfie his just revenge. As also since they can sooner prevail, they ought to be more rigidly punished. The Law has deny'd this priviledge to women, who may not kill their Daughters or Husbands, the reasons whereof may be conceived to have been, that the Law considered, that Husbands were more prejudged then the Wives, by adultery, since thereby, not only was their bed defiled, but their estate carryed away to another mans children, or else it thought women too passion

onat to be intrusted with such a licence, or that it was undecent
 to allow women the use of Armes: And yet I believe their just
 grief would secure them against the ordinar punishment; and
 though some prerogative be due to the man over his wife, but
 not *à contra*, yet women may complain that men being the on-
 ly Legislators, have taken too great a measure of favour to
 themselves in this Law. I have not observed any decision of
 this in our Law, and since our statutes have secured murderers
 in other cases, as in self-defence, killing of thieves, &c. And
 yet have not priviledged this case, it may seem that the husband
 or father cannot kill by our Law, and the most that they could
 expect, were, that after they were found guilty by the Law, the
 Council might either change the doom of death into an arbi-
 trary punishment, or might recomend the party to his Majesties
 clemency for a remission: But it were hard to punish with
 death amongst us, what almost all Nations allow as lawful, and
 what may be yet a further check to that growing vice. And
 this seems juster then to allow with the Civil Law, that the
 Husband or Father, who are persons interested, should be judg-
 es in their own concern, and should be judges when they are in
 passion, and because they are in passion; Nor can I see why the
 Law should punish even him who possesses by his own autho-
 rity what is truly his own, and yet should allow here the par-
 ties interested to punish with death by their own authority: or
 that passion which only infers mitigation of the pain elsewhere,
 should here infer absolute impunity, for this were to make one
 regular Act legitimat another, since passion is a transgression
 against reason, as Adultry is against Law: But since this indul-
 gence is personal, and only granted to the Father and Husband,
 because of their just passion and near relation, it is not reason-
 able that it should be extended to such as kill by the Fathers or
 Husbands Command, which command none ought to obey,
 being contrair to Law: Nor ought this indulgence to extend
 to the Father or Husband when they kill *ex intervallo*, and not
 when

when they find the Committers in the very transgression, for the Law allows no passion to continue; & therefore what ever revenge is allowed to it, is only allowed if it be executed immediately, *Ex in continenti*. And though in civil cases that is said to be done *ex in continenti*, or immediately, which is done before the doer go about any thing else: Yet I conceive that interpretation would be too lax in this case, and that the killer could not plead this privilege, except he killed them in the very Act, or rising from it.

Homicidium deliberatum, or upon fore-thought Felony, is still punishable by death, and confiscation of the movables, & the Detunſt for His Majesties ute, *Stat. Rob. 3. cap. 43.* And albeit Lawyers say, that it is still rather presumable to be casual, then deliberat, and that by our Law and custome, designe is still libelled, yet because it is impossible to prove design, which is a secret act of the mind. All killing is alwayes punishable by death, except some of the qualities of chance, self-defence &c. be alledged upon by the Pannel. It may be here asked, if by our Law, he who strikes with his fist, or a batton (which are themselves no mortal weapons) be punishable by death, though the party struck there by him dye: And it would seem that he should, seeing no designe to kill can be here presumed. *& maleficia voluntas & affectus distinguunt*, and by the 5. *Wil. Reg. num. 4.* It is said, that *si quis interficiat cum pugno bit regi 25. vacas, & satisfaciet parentela defuncti secundum assisam regni*, by which it would appear, that striking with the fist is not capital, albeit death follow.

Murder premeditated, may be divided into that species which is simply such, Assassination, Murder under trust, and self Murder.

XVI. Murder under trust, is with us, when a party who put himself under the assurance and trust of another, is murdered by him: and this is by a special statute punished as treason, *Act. 51. P. 11. Ja. 6.* The words are (where the party

lain is under the *traist, credit, assurance, and power of the slayer*; the party being tryed and found guilty thereof by an assize, it shall be Treason, and the person found culpable, shall forfeit Life, Lands, and Goods) what this credit and assurance is, hath oft been questioned, and it is reported that the origin of this, was to punish the Murder of a Gentleman, who invited his neighbour to a feast, and killed him and all his relations in his own house : so that invitation is one branch of this trust. 2. Assurance signifies, that when two persons were at fead, and the one hath found borrows to one another, Act 97. *1. p. 6.* 3. Where persons at variance are under capitulation. 4 This Act has been st etcht to the conjugal trust betwixt man and wife, *anno. 1627. Andrew Row*, And yet in the Procefs intented against *Swintoun*, for killing his wife, *anno. 1666.* It being objected that this act extended not to such trusts as this, the pursuer restricted his Libel to Murder. And the Lords of Session. *Anno. 1665.* found that a sons killing his own mother, was not a murder under trust, punishable by this act : and yet it would appear, that both killing of wives and Children falls under that branch of the act, where the party is under the power of the slayer. This species of Murder was by the *Civilians*, called *proditio*, which is designed to be *homicidium sub pretextu amicitie, v. g. dum sederem tecum in mensa vel amicum fingerem*, which is punishable by a more severe death then ordinar Murders. And in *Spain*, the betrayer or proditor (for even in propriety of speech, Murder under trust is treachery, or Treason) *trahitur ad caudam equi & postea furca suspenditur*, Gomez.

By that act likewise, tryal should be taken by an assize; And therefore the Lords found, that though *Mr. James Oliphant* had been guilty of killing his Mother, and that it had been Treason, yet his forfeiter could not fall to the King, upon a simple Denunciation for not appearing to underly the Law, because a tryal is requisite in this case. And by the 137. *act. 13*

Par. 74. 6. The killing any person in the Parliament-House, during the sitting thereof, or the inner Tolbuith (*id est*, the inner house of the Session) during the sitting thereof, or the Council-house whilst the Lords sit, or kill any in the Kings Chamber, Cabinet, or Chamber of peace, or in the kings presence any where, infers the pain of Treason.

XVII. What is interpret to be art and part of Murder, can hardly be defined, for it does depend upon the affize: A designe to Murder, though no Murder follow, *affectus sine effectu puniatur capitaliter*, l. 1. *is qui cum telo*, C. *ad Corn. de Sicar*: by the custome of nations, the punishment now reaches not less. *Clar. hoc. tit. num. 74.* and I find that *Mathew Stewart*, being pursued for contriving the death of *Thomas Kennedie*, came in the Kings will, and was only banisht, *Mart: 1597.* As also I find, that though *Lawson* was cleansed of the murder of her own child, yet she being referred, to the Justices, because of the violent presumptions adduced against her, and that she her self had confest she bore a dead child; the Justices therefore did ordain her to be whipt and banisht, *August. 1662.* and *Margaret Ramsay* having confest that she bore a dead child, and was advised to cast it into the north Loch, which she did not, though without her knowledge was done by others; the Justices, though she was assoyled by the inquest, ordained her to be scourged and banisht, 1661.

XVIII. Though such as kill in prosecution of Law, are punishable as Murderers, yet if they exceed, they are punishable, not only *quo ad excessum*, arbitrarily, but even *paua ordinaria*, as Murderers. An instance whereof was decided, the 20th of June 1672. in the person of Mr. *Archibald Beath*, who being Pannelled for killing *Allan Gairdiner*, alledged that the Council had by their Act and Proclamation, ordained all Murders

brought from *Ireland* to be seiz'd upon, and the boats where-
in it was brought, to be sunk, in prosecution whereof *Gardi-
ners* Meal being Seiz'd, he broke the Seizure, and being follow-
ed in a Boate, by the said Mr. *Archibald*, and others, he was
commanded to stay his Boat, but was so farr from obeying,
though commanded in His *Majestie's* name, that he had run
almost down the Pannels little Boat, who was thereupon
forced to shoot at them, and though this Act, *ex post facto*, de-
generat into an act of killing, yet no killing was at first inten-
ded; and the rise of all such Actions is to be first considered.

To which it was replied, that this act was to be understood
aviliter, and did only impower the Leidges to Seize, but not
to kill, and all mandats are to be so interpreted, as not to be
extended, *ad ea quæ mandans in specie non mandasset*, or *quæ soli-
tus est mandare si aliquando mandat non mandat nisi certa forma
servata*, but it cannot be subsumed that the Council would
have allowed the importer of such victual, to be killed, nor do
they use to intrust the execution of such Laws to Ministers;
and if they had designed that the execution of this prohibition,
should reach death, they would have expressly allow'd the Seiz-
ers to kill, as they use to do in such cases. To which it was
reply'd, that though the Minister was not obliged to con-
cur because of his function, yet concurring as a Subject, he is
punishable therefore capitally; and if a Minister should
concur when the hue and cry were raised after a night Thief, or
if a Minister did assist such as pursued Rebels, and should kill
in the pursuite, it were absurd to conclude that he should be pu-
nished as a Murderer, because he was not obliged to kill: and it is
not imaginable, but if it had been propos'd to the Council what
seizers should do, in case of resistance, but they would have au-
thorized them to kill, nor could their act receive compleat obedi-
ence in case of resistance, for else such as resolv'd to contraveen,
might secure themselves by their resistance, and the Council by

empowering to sink the Boat where the Viſual is, does very clearly impower the killing of ſuch as reſiſt, for they might have been ſunk in the Boat, and he who is allowed to ſink a Boat, is allowed to ſink all who are in it. Notwithſtanding of which defences, the ſaid Mr. *Archibald* was put to the knowledge of an inqueſt, and after the verdict was ordain'd to loſe his head, but the Parliament having thereafter that ſame moneth allowed by their act, ſuch as reſiſted to be killed, the ſaid Mr. *Archibald* was thereupon remitted as to the Crime, but was never readmitted to his Church.

Some *Militia* Souldiers alſo being purſued for Murder, *Febr.* 1674. alledged that they could not go to the knowledge of an inqueſt as Murderers, ſince if they killed, it was in proſecution of their Officers orders, for they being ſent to Poynd, were reſiſted, and though it was reply'd, that oppoſition to the poſſe could not warrant killing, but they might have purſued the ryot: This was alledged not to be relevant, becauſe, *sibi impotent*, who oppoſed, and Souldiers muſt do effectually what commanded: and their Officers may ſhoot them if they reſiſt without effectuating what was commanded, and military commands muſt not be delayed, nor oppoſed, like other commands. Notwithſtanding of which debate they were found guilty.

XIX. It is much controverted amongſt the Doctours, whether it be lawful, *occidere hannitum*, a Perſon at the Horn, as by the Civil Law, *non licet Bart. in l. ut vim. N. 1. ff. de iur. & jure*, but by the Statutes of particular places, they all conclude, it may be lawful, *ob quietem publicam*: as by our old Decisions, that the killing of ſuch as are at the Horn for Slaughter, or other Crimes, is not Criminal. *January* 1600. *Guthrie contra Farden*: but by the ſaid 22. *Alt Par. 1. Ch. 2.* It is declared, that the killing ſuch as are denounced, or declared Rebels, for Capital Crimes, or ſuch as defend theſe Rebels, may be lawfully killed; where by it is implied, that ſuch as are at the Horn for other Crimes

may not be killed ; and such could not be lawfully killed, who are only at the Horn for Pecunial Causes, and any Statute allowing to kill such, would be null, *Clar. hoc. tit num.* 13. But it may be here doubted, what are these Criminal Causes, for which one at the Horn may be killed ? for clearing whereof, it is fit to remember, that the Doctors allow only such to be killed, who are *banniti ob grave delictum*, *Clar. num.* 53. and in reason, it should be such a Crime, for which the Rebel hath deserved death, if he had appeared ; for it seems rigid and unjust, that wherever the conclusion of the Summons was Criminal, the Party being Denounced, may be killed ; or that when ever the Rebel was Denounced for absence from a Justice-Court, he may be killed, seeing the common-good, which is the reason inductive of this Law, do's not require, nor in effect is not consistent with thir interpretations. 2. It may be doubted, if he who kills a Rebel for private revenge, and not *ob vindictam publicam*, will have the benefite of this Defence: of this we have an instance, *anno 1600.* where *Robert Auchmoutie* being pursued for the Slaughter of *James Wauchop*, it was alledged that the Defunct was at the Horn, for receipting a Traitor: to which it was replied, that the Pannel killed him upon a private quarrel, for having conversed with the Defunct long after he was at the Horn, for that cause: but that he killed him in a Duel, upon a privat quarrel: in respect whereof, the Pannels defence was repelled, and he put to the knowledge of an Inquest, and thereafter beheaded. And yet I find the Doctors of opinion, that *bannito occiso per inimicum occidens non reputatur homicida*, and which is more, he will not have right to the reward promised for killing the Rebel, *Cap. vet in Prag. 1. de exul num.* 134. and enemies are these who most probably will execute this publick Justice, which the Law designes. And seeing our late Act makes no distinction betwixt such as kill upon publick and private revenge ;

I believe that the case now hath no difficulty, and that now the killer in both cases would be free from Punishment. Yet I think, that he who would kill a Rebel in a Combat, might yet be Pannelled, for contraveining that Act anent Duels; for though he might lawfully kill a Rebel, yet he could not lawfully fight a Duel. 3. It may be doubted, if he who was Denounced Rebel, was not lawfully Denounced, v. g. if he was out of the Countrey the time of the Charge, or that the Execution was not stamped, or wanted some Solemnity, *in eo casu*, the killer would be guilty of Murder: which Defence, I find likewise propon'd in the former case, and yet repelled, and very justly, for a privat Person is not obliged to know these nullities. If any man resist the execution of his Majesties Laws, by Messengers, or other publick Servants, in that case, the Messenger cannot proceed to kill, as was found in *John Mackintoshes* case, May 11. 1673. but if the resister do also proceed, to offer violence, by drawing upon the Messenger, in that case the Messenger may kill him lawfully, without necessity of proving that he would have been in danger of his life, if he had not killed; though privat persons cannot kill when they are invaded, except they be by that invasion put in danger of their life.

XX. Albeit ordinarily death, and the confiscation of Moveables, is the punishment of Murder; and that the life-rent of the Murderer doth not thereby fall; yet in some cases, the life-rent falls, as by the 118 Act 12. Par. 4. 6. These who are denounced Rebels, for slaying men in the Church, or Church-yard, in the time of Prayer, Preaching, or administration of the Sacraments, their Life-rents presently falls to the King (though *regulariter* Life-rent Escheits fall to the respective Superior, and the receipters do likewise loose their Life-rent Escheats; declarator being first past upon the receipt. It may be here doubted, if these words, *the time of Divine Service*, may extend to slaughters, committed the

time

time of Preaching, &c. Albeit there be no Preaching, or Prayer for the time there : the reason of the doubt is, seeing the 39. *Act* of the 6. *Par. 2. M.* anent removing, is so interpreted : for by that *Act*, warning of Tennents should be used at the Paroch Church, the time of Preaching or Prayer : which words are thus interpreted, the time that Preaching uses to be, though there be none at the time.

By the 219. *Act Par. 14. Fa. 6.* If either the pursuer or defender in civil pursuits, kill one another, during the dependence, *eo casu*, the killer being put to the Horn, either for not compearance at the Dyet, or for not finding Caution, he loses his Life-rent Escheat immediatly upon the Denunciation.

XXI. Murder is one of the four Plea's of the Crown, *Malcol. 2. c. 11.* and therefore the cognition thereof belongs to the Justices; and Commissions cannot be granted for tryal thereof, *Act 74. Fa. 6. Par. 11.* albeit it be now most ordinar, to grant such Commissions: and yet this *Act* being alleadged against one of those Commissioners, before the Council, they did recall the same : but if the Murderer be taken *red hand*, he may be judged by a Barron (having power of Pit and Gallows) by a Sheriff, or any other Judge ordinar; betwixt which, there is likewise this difference, that Murder isailable, *Fa. 3. Par. 6. c. 42.* But Slaughter taken *red hand*, is notailable; but the committer thereof should be judged within that Sun, *Fa. 1. Par. 6. c. 89. 95.* And if the Barron or Sheriff proceed not within that time, the Cognition belongs only to the Justices, for they are Judges to Murder upon citation.

XXII. By several old Acts, I find that the Sheriff, when a Murder is committed, may raise the Kings Horn (*id est*, the hue and cry, *hoesum*, as the Latine translation calls it) upon the Murder, and follow him out of his Sherifdom, and send Letters to the next, and he to a third, and so till he be

be taken, and that when he is taken, Justice should be done upon him, within forty dayes, and that he should be sent from Sheriff to Sheriff, to the place where the Crime was committed, which is now absolet; for if he be not taken red hand, the Sheriff cannot proceed against him; albe it it would appear that he may, if he be taken within forty dayes, *Fa. 1. Par. 6. c. 89.* which I find now here abrogated, nor any thing to the contrair, except only *Hops* assertion, in his lesser *Practiques*, and that may be interpret also of Cognitions, after the forty dayes are expired.

By the 50. *Act* of the 6. *Par. Fa. 1.* It is Statuted, that Sheriffs in the former case, may proclaim the Murderer fugitive, and forbid all the Lieges to receipt him, under the pain of losing Life and Goods; but this power is also absolet. And the receipting Murderers seems not any accesson, except other presumptions be adduced, as if the Murder was committed upon the receipters account: in which case receipting, may be arbitrarily punisht, but of this, I find no formal Decision, only the Registers mention, that *Thomas Brice*, being accused for receipting his own Son, who had Murdered *Fairhop*: it was alledged, that the receipting his own Son could be no Crime, *nam proximitas sanguinis tollit presumptionem criminis hoc casu Clar. quest. 110. num. 54. & l. 2. ff. de recept.* And receipt could only be interpret to be a Crime, In our Law, after the committers are Denounced, and Letters of intercommuning obtained against them: which Defence was thought so relevant, that the Justices demur'd upon it, but this received Decision.

XXIII. When a man is killed by fore-thought fellow the King can by our Law grant no Remission for the Murder, *Fa. 4. Par. 6. cap. 63.* and *Fa. 6. cap. 13. cap. 16.* But yet Remissions are daily granted, for such Murderers

and are admitted in the Justice Court ; notwithstanding of this objection, as in the Earl of *Caithnes* case, in anno 1668. And it is alledged, that these Acts are by the Stile, but temporary Acts. But all such Remissions are null, except the offender offer to Assist the Party: which Assitment is modified by the Council, and the Party cannot propon upon his Remission, till he find present Caution, to satisfie what shall be modified, within fourty dayes, or else he must, during these fourty dayes, go to Prison, and if payment be not made within fourty dayes, his Remission is null, *Far. 14. cap. 75.*

Assassini crimen, or to kill a man by Assassination, is to Murder a man for Money ; and this Species was introduced, first, by the Canon Law, *cap. 1. de homicid. cap. 6.* and had its name from the *Assassini*, who were a Tribe of the Phœnicians; and who said themselves to be Christians, being truly Mahumetans, that they might kill Christians; and therefore, and because the foresaid Canon speaks only of Christians, it is still concluded, that only such as kill Christians, are to be repute Assassins; and the killer of a Jew was found no Assasinate, *Cavall. h. t. num. 475.* And yet *Matheus* thinks, that all killing for Money, is Assassination; for this Crime being founded upon Nature, to kill a Jew is as far against Nature, as to kill a Christian. And it is a greater scandal upon our Religion, to kill a Jew, because it reproaches us amongst Infidels.

The Specialities introduced in this Crime, are, that the endeavour to kill for Money, is a Crime, though death follow not: and that Assassination may be proved, by presumptions; and that they cannot enjoy the benefite of Sanctuary, or Girth, *Cabal. num. 501. 515. 526.* And though the foresaid Canon run only against such, as

undertake to kill for Money, yet the Conducers, or factious as intreat them to kill, are also Assassins, *Gomez. 3. fol. 3. num. 10. Math. pag. 521.* But these are not in our servance with us, except as to the Priviledge of a Sanctuary: from which, all such as committed Murder under Trust, or *per insidias* (which that Act calls *Assassins* only) are expressly excluded, *Act 35. part. 5. F. 3.*

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T I T L E X I I .

Of Duels.

1. *The several kinds of Duels, allowed of old by other Nations.*
2. *What Duels were allowed of old in Scotland.*
3. *How the giving and receiving challenges is punishable, though no Combat follow.*
4. *The way of Libelling used in this case.*
5. *Whether Duels for reparation of honour, be lawful, where no other reparation can be had.*
6. *What must be proved in this Crime.*
7. *Whether he be not punishable who kills in a rancounter only, or he who tells the provoker that he is going to such a place.*
8. *The punishment of Duels, and who are accomplices and part.*

Duels are but illustrious and honourable Murders. And therefore I have subjoyned this Title to the Title of Homicide: This is that imperious Crime, which triumphs over both publick revenge, and privat vertue, and tramples proudly upon both the Law of the Nation, and the life of our enemy. Courage thinks Law here to be but pedantrie, and honour persuades men, that obedience here is cowardlines.

1. We find no such Crime as this among the *Romans*, because that wise Nation employed their lives against their enemies, and not against their fellow-Citizens: And the true trial

of courage among them, was fighting against the enemies of Rome.

Duels are either Judicial or Extrajudicial: Judicial Duels were these which were allowed by Law, for trying the innocence of such as wanted other legal probations.

The *Longabards* first did allow this way of Duelling, by pullick authority, who did regulat it by twenty several determinations: And thereafter it was renewed by *Philip*, the first King of France, Anno 1360. but was bounded with these four conditions, 1. That it should only be allowed in Criminal and capital cases. 2. That it should only be allowed in Crimes treacherously committed, where the Truth could not be otherways found out. 3. Where there did lye strong presumptions against the persons provoked. 4. Where it was certain there was such a Crime committed against the provoker.

II. With us in Scotland, Duels were allowed not only clearing of innocence, as to Crimes, but likewise in civil cases as when an Heir denied that his predecessor granted a Conjunction. *R. M. lib. 2. cap. 16. v. 47.* And when any thing was denied to be lawfully bought by the owner, *Lib. 3. cap. 13. v. 1.* But thereafter I find that by the 16. cap. Stat. Rob. 3. All duels are discharged, except in the four former cases allowed by *Phillip the fair*. The solemnity of Cartels used in such cases was the casting of *Gloves* to one another, as is clear by *Skeene. cap. 24. v. 9. R. M. Duelliones in hoc regno hinc inde cartas offerunt*, which custome had its origine from the *Longabard Law* above cited, as is clear by *Long. de duel: and Du band. tit. eod.* The place appointed by our Law for such Duels, was the Bridge of *Stirling. cap. 28. Stat. David.* And if the appealer in ordinar Crimes was foild and worsted, his pledges payed the King nine Cowes and a Colpindach, satisfied for the calumny, *Stat. Alex. cap. 11.* But in the case of the appealer worsted became in the Kings will, and the party appeased, being worsted, was disherished. *R. M. L.*

c. 1. But these Duels are Discharged by the Canon Law. *cap. monomachia.* 2. *quest. 4. & cap. ultim Ext. de purg. vulg.* though with us such judicial Combats, by authority, are not absolutely discharged, for, by the 12. *cap. 16. Parl. F. 6.* Wherein singular Combats are discharged, there is an exception made of such as are fought with His Highness licence.

III. Duels undertaken without publick authority, are thought by many Lawyers, to be lawful, when undertaken by a person who is injured in his honour, if the party injured cannot be otherways repaid; either because there is not a judge in the place, or else the injurer will not appear before him, or though he compear, the Judges refuses to do Justice, *ubi enim deficit jus ibi suplet ensis & propria ultio. Bart. in L. hostes num. 9. ff. de cap. & postlin. revers.* And many are of opinion that these privat Combats are lawful, for defence of our honour, and as we may defend our life by taking that of our neighbours, so we may defend our honour by the hazard of his life.

But that Duels are in themselves unlawful by all Law, appears very clearly from these reasons,

1. That the Law has justly thought fit that the Magistrat only should do justice to all, and that no private man should revenge himself; for in so far he commits treason, in assuming the power of the Civil Magistrate. 2. The power of taking and using Arms, belongs only to the Common-wealth, and consequently no private man should run to Armes, upon an imagination that he is wronged in his honour. 3. There is no proportion betwixt the injury and reparation, in such cases a verbal injury being too severely punished, when punished by death, there being no proportion betwixt what may be helped, and what may not. 4. Revenge belonging to God, it is an usurping of his power. It is the destroying that body which is the Temple of God, the defacing of his image (whereas to deface even a Princes, Image, designedly is Treason) and it is a spilling of that blood for which Christ shed his. 5. It is a crime.

a crime against a mans self, and is in effect self-murder: Nor need those who resolve to kill themselves, take a base way, since this honourable way is easy and patent, for he may soon make quarrels, and so kill constantly till he be killed.

It is a Crime against the common wealth, because it destroys its subjects, and makes the hateful sin of Murder a desirable effect of Glory. It is likewise a great offence against our friends, since it drawes them, though innocent, into the same snare, as seconds, assisters, and revengers: and it is dishonourable, because it wrongs a mans wife, by making her miserable, and notwithstanding of his many obligations to her. 6. It is an unjust decision of controversies, since strength, skill, or accident, prevail oftentimes against honour and innocence, so that this tryal should neither be allowed, by justice, nor honour: and therefore *Augustus* being provoked by *Anthony*, did nobly answer, that if *Anthony* was weary of his life, he might take any other way to dispatch himself. And *Sertorius* being provoked by *Metellus*, answered, it was below a General to dye like a common Souldier: And therefore it may be answered to the contrary arguments, that it is to be presumed the Magistrate will do justice in repairing the fame of him who is wronged, nor can a Duel restore the fame that is lost, for a Duel shews only a man to be resolute, or desperat, without being innocent, or generous: and it is more presumable, that the provoker was justly defamed, and finding himself unable to survive the shame, resolves to dispatch himself by this plausible way of self-murder, nor can a man take a more easy way publishing that wherein he was defamed, then by killing the defamer, whereby he will both bring himself and the occasion of that accident into the mouths of the world. Though that act discharge only singular Combats: And that the word *singular Combat* is properly only applicable to the fighting of two single persons, which is only properly called *singulare certamen* yet this *singulare certamen*, or *singular Combat* is properly

perly enough extended where moe fight on a side. *Cagnol. in l. Favorabiliores 86. ff. de reg. jur.*

V. Since fighting of singular combats is only declared punishable, therefore the giving or receiving challenges is not punishable by death, though even that be likewise punishable by the Council *Arbitrarie*, as ending to disturb the peace, but since the very fighting is declared punishable by death, it follows necessarily, that such as fight Combats, are punishable by death, though neither party be killed: And if only killing had been punishable by death, this act had been unnecessary, since that was punishable as Murder before this act.

VI. If any person be killed, the libel is founded both upon the Acts against murder, and this act against Duels. But the difference betwixt the way of libelling is this; that if the libel be only founded upon the acts against Murder, then self-defence is receiveable by way of exculpation to eleid this libel, because self-defence there, is not contrair to any quality of the libel, which must be expressly proved, for the quality of forethought felony must necessarily be libelled in Murder. Yet it needs not be proved, and so the probation of the defence and libel, are not contrary. Whereas in Duels an express provocation must belybel'd and proved, and so the probation of the libel and defence would be contrary, as was found in the case of *Mackie*, in *June*, 1670. where it was likewise found that a challenge given and accepted, did infer a Duel and it was not sufficient, that the party provoked, coming thereafter to the field, was set upon, and put in hazard of his life by the provoker, for though *primus insultus*, be sufficient to defend against forethought felony in other cases, yet where there preceeded a provocation, it is not sufficient, because he who was provoked by going to the place, *versabatur in illicito*, and so should not have the benefite of self-defence. And if this were allowed, the party provoked might easily elude this statute, because he might accept the challenge: And yet when he is upon the place

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place, refuse to fight, untill he were set upon by the other, and put even in hazard of his life by him, which method being followed by one *Robertson*, a Souldier in *Linlithgow's* Regiment, he was notwithstanding found guilty of Murder, in *July 1673*.

VII. From this it appears likewise that such as in answer to challenges, do declare, that they will be in such a place at such a time, and if the provoker attaque, they will defend themselves, they fall within the compasse of this act, since by declining a formal answer, they designe to cheat the Law, for by assigning place and time, they in effect accept of the challenge & this can neither be called a meer rancounter, nor self defence as is most justly debated by *Voet. de duel. cap. 33. quest. 1.* be if any man getting a challenge, shall answer, that he will not transgress the Law, but if the challenger shall attaque him, he will defend himself, if this person thereafter in defence he will not be punishable by this act, for self defence does not leave off to be a legal defence, because the person attaque promises he will defend himself.

VIII. Both the provoker and provoked, killing, are by this act not only punishable with death, but by confiscation of their moveables; and the provoker is declared lyable to such arbitrary punishments as his Majesty shall think fit, because his guilt is greatest, for the party provoked hath still his guilt lessened with a shadow of self-defence.

Not only are Seconds art and part, but even those who carried the challenge, though they were no Seconds: and yet may be alledged, that these cannot be punished with death, except they were present, since the carrying a challenge is but an incomplete act, & *nudus conatus*. But yet it may be answered, that if death follow upon a Combat, wherein they carried the challenge, they are punishable as murderers, since the crime was compleated by their complices. In *June. 1676*. *D. Hamilton* was found guilty, though it was alledged that altho he had come to seek the length of his gear who was to fight

with his Son, yet that was done but upon designe to terrifie the other to fight, as appears, not only by the strangeness of the expression, but because he did tear the challenge, how soon ever he got it in his hands: and albeit it was proved that he did trip up the mans heels who was fighting with his son, yet that was done meerly to end the Combat, he having taken his own Son in his armes immediatly thereafter.

In this case it was likewise alledged, that those who were adduced witnesses could not be received, because they had come out of the house with the other party to the field; and being very many in number, they might have stopt the Combat, if they had pleased: notwithstanding of which objection, they were received. But I conceive, that since all men are obliged, as farr as in them lyes, to keep the peace, and hinder crimes, it seems very reasonable, that if many who might hinder, do tamly look on, without offering to redd or separat the parties, they should be punished; and this should hold not only in any of the Kings officers who are present, or in any who are commanded by them whom *Cook* observes to be fineable, pag. 158: but even in all who are present, though the punishment, as to them, should be lesse, then as to the others, *idem est facere, & nolle prohibere cum possis: & qui non prohibet cum prohibere possit: in culpa est.*

V

TITLE

TITLE XIII.

Self-Murder.

-
1. *Despair, nor Stoicism, cannot defend against Self-Murder.*
 2. *Curiosity does defend.*
 3. *An endeavour to commit Self-Murder, is punishable.*
 4. *Self-Murder may be committed by omission, as well as commission.*
 5. *What Declarator is to be pursued by the Donators, of the Self-Murderers Escheat, and how it is to be proved.*

I. **G**OD Almighty has placed every man at his Post here and he who violently tears himself from it, deserves much worse, and is more guilty then a Souldier, who desertts his station : and since Princes punish as Criminals, such as kill their Subjects; much more may the Almighty punish him who kills himself; for he who kills himself kills Gods Subject, and therefore, *Nemo est dominus suorum membrorum*. The Law likewise considers him who would kill himself, as one who would spare none else, and condemns an humour which is so dangerous.

Upon these reasons, but especially, because God hath forbid man to kill, without making a distinction of killing our selves, or others; all Christian Nations punish severely Self-murder, as Murder, for they confiscate their Moveables, and deny them Christian Burials: to which some Nations, for a further mark of Ignominy, add the hanging them upon Gibbets: but this last, our Nation uses not.

This Crime was called *αυτοχρηια* by the Greeks, and it was condemned by *Plato*, *l. 9. de leg.* and was at first punished by the Heathens, — *Virgil. lib. 6. Aeneid.* speaking of Hell, *proxima deinde tenent maesti loca, qui sibi lathum insontes pepere manu lumenq; pero si projicere animas:* the English call him, *felo de se.*

The Stoicks who had made their Reason their God, and made their convenience their Reason; allowed the killing of ones self, either to shun thereby Torture, or Shame, and thought death a door, which every man might open at his pleasure: for, since death may surprize a man when he is not ready, they resolved to be some way equal with it, in forcing it to be ready, whensoever they pleased. And from their practice (for most of the Romans, especially the Gownmen, were of that Sect) flow'd these Roman Laws, *l. 3. sic autem ff. de bon. eor. l. si quis §. ult. ff. de pen.* By which they distinguish betwixt such as killed themselves, to evite a just punishment of the Crimes for which they were accused; and such as killed themselves, *radio viæ, vel doloris impatientia:* for the first, they punisht as Murderer, but the last, they favoured with a lesser punishment. Nay, and in the Primitive Church, many for making themselves away, to evite thereby Idolatry, or Pollution, have been accounted as Martyres: thus the Wife and Children of *Adauctus*, having killed themselves, when

they were to be deflowered; 'it was doubted, if they ought not to have been numbered amongst the Martyres; <sup>ENTRE DE AP-
BUNTAIS MARTYRES.</sup> Cedren. pag. 220. and the like story is reported by *Euseb. lib. 8. cap. 17.* of a Noble Lady, who was brought to *Maxentius*. But our Law is jealous, that such pretexts might be brought, to colour all base designs; and allowing none to be their own Judges, has made no such distinction, as was found in the case of *Thomas Dobbie*, cited by *Craig. diages. de regal.* and to allow this, were to feed despair, and to make patience, and long-suffering, to be no virtues.

II. Yet curiosity and madness, ought to defend against all Punishment in this case, since a furious Person has no will in the construction of Law; and the will is that which makes the Crime: nor should they be more punished then Infants are, to whom the Law compares them. Fury also defends against Treason, Blasphemy, and Heresie, which are more atrocious Crimes, then Self-murder, & *facti infelicitas furiosum defendere dicitur, l. infans ad l. Corn. de sic*: and therefore I cannot well understand, wherefore in *Dobbies* case (as *Craig* relates it) the Lords repelled the Defence of Furiosity, and found that even furious Persons ought to lose their Moveables, if they killed themselves; but I think, the fury there has not been strongly qualified, and that it has been but a Species of Melancholy: for the reason given for that Decision is, because the Lords thought no man would kill himself, if he were not distracted: and so if distraction could defend such as killed themselves, against confiscation of their Moveables, it would defend all who kill'd themselves, and so the Law should have no effect; but this must be interpreted, of some degrees of madness, for sure no man kills himself, except he who is somewhat mad. Nor does *Hy-pocondrick* fits, or the first degrees of madness, defend against this Confiscation, but a total aberration from reason, cannot

cannot but defend; which is also clear from the Law of *England*, *Bolton, Cap. 11, lib. 1.* and the difference betwixt these two must be inferred from the various circumstances, which attends such diseases, and from the declarations of Physicians, who waited upon them.

Whether one who is mad, but has lucid intervals, is presumed to have killed himself in his madness, or lucid intervals, is not so clear; and depends much upon Circumstances: but since none use to kill themselves, except under some distemper; so therefore, it is more humane to refer this killing, to have been in the hours of madness, except it can be proved that the killer used even in his lucid intervals, to wish he were dead, or to commend Self-Murder, *vid. Cabal. cas. 289.*

III. An endeavour to kill ones self is punishable, as Self-Murder, if the killer did all that in him was, to effectuate it; as if he hang'd himself, but was immediately cut down. And by the Law of *England*, if a man wound himself mortally, though he live year and day thereafter, his Goods falls to the King, *Bolton, lib. 1, cap. 10.*

IV. Self-Murder may be committed by omission, as well as commission, thus if a man would starve himself to death, he might be punished by confiscation of his Moveables; but the design must be clearly proved, since as many innocent people might be alledged, to have killed themselves, whilst they have fasted, either through pain or necessity.

V. When a man kills himself, his Majesty gifts his Escheat, and the Donator pursues a general Declarator thereupon, wherein he calls the nearest of kin, and he must prove there, that the Person, whose Escheat he has got, killed himself; which must be proved, by clear and convincing evidences, such as the depositions of Witnesses, or a Paper under-

der the Defuncts hand, wherein he declares the reasons of his discontent, and why he killed himself, which is very ordinary in these cases, wherein they design thereby to justify to the world, this horrid Act: But I think, presumptions are not sufficient here, since this is a Crime except they be very strong and violent; but if they be such, it appears they are sufficient to infer Confiscation: for though presumptions be not sufficient to prove a Crime, to infer Capital punishment, yet they are oftentimes sustained, to infer Confiscation of Moveables, or other civil effects. And if presumptions were not sufficient in this case, Self-Murder could never be proved, for the committers choose retired places, and quiet times, for executing their wicked designe: and who could say, but that if a man were known, to have express much despair, and thereupon to have entered into a Room, and were found with the Door closed, and hanging in his own Garter: but that these presumptions would infer Confiscation of his Moveables.

By our practice, their Declarators have been sustained before the Lords, upon probation of the Self-Murder led before themselves, without any previous tryal before the Justices: and some think such a previous tryal not necessary for all tryals before them, are by Assizers, and dead men cannot be tryed by an Assize: but it might be alledged upon the other hand, that such a previous tryal before the Justices, is more suitable to the analogy of all other Crimes, which are all tryed before the Justices; and though it may be alleged, that the Lords jurisdiction is here founded, *ratione materiae*, and that many Crimes are tryed before them, as arising incidently in other civil cases; yet even in falsehood, though the Lords of Session are Judges competent to the deed itself. Yet no mans Escheat falls upon their Decreet, though he be found a falsary by them, till he be also tryed by the Justices.

the Escheat falls, as an effect of their sentence only. Nor has this exception been yet repelled, as to Self-Murder, so that *res est ad huc integra*, especially if the persons whose Escheat is craved, to be declared, be yet alive; so that he may be tryed before an Assize, for having endeavoured to kill himself: for some endeavours to kill ones self, are punishable by death, though prevented, as has been said formerly. And in that case, I conceive that a previous tryal before the Justices, is necessary.

TITLE.

TITLE XIV.

Paricide.

-
- 1 *To what degree reaches Paricide by the Civil Law.*
 - 2 *To what degrees by our Law?*
 - 3 *Whether does the Act 220. Fa. 6. Par. 14. extend to Ascendents?*
 - 4 *Whether does that Statute extend to Bastards.*
 - 5 *The punishment of Paricide by that Statute.*
 - 6 *The 20. Act Par. 1. Ch. 2. concerning beating of Parents explained.*
 - 7 *How the murdering of Children is punished.*
 - 8 *Who are reputed accessory in this Crime, and how punished.*

I. **P**ARICIDE is a Crime, which is committed by killing of Parents, against which, *Solon* refused to make any Law, lest he should by forbidding it, teach the people it was possible. By the Civil Law, Paricide was committed by killing Ascendents, or Descendents, in any degree: or collateral to the fourth degree. The killing likewise of Wife, Husband, or Patron, was Paricide by that Law, *l. 1. ff. h. t.*

II. With us, Paricide is by the Statute 220. Fa. 6 Par. 14. punished only in him who kills his Father, Mother

Good

Good-fir, or Good-dame; and these are by that Act, ordained to be disinherited, and their posterity, *in linea recta*, are incapable of succeeding to the person killed: but the succession is devolved upon the next Collateral, or nearest of Blood; the person guilty being convicted by an Assize.

From which Act, it is observable, that the Statute is not exclusive of other punishments: but supposes that Paricide is capitally punishable, according to the Common Law; for it were absurd to think, the punishment here related, should be the only punishment, by which Paricide could be reached. And Women for murdering their Children, are frequently either hanged, or headed, as other Murderers. 2. This Act reaches only such, as are convicted by an Assize; and therefore *January 1664.* it was found, that Sir *James Oliphant* being declared Fugitive, for killing his Mother, but not convicted by an Assize, his Estate could not be gifted by the King: and in effect, though he had been found guilty by an Assize, he could not have been forefaulted, for the nearest Collateral would seclude the Fisk. It was likewise found in that case, that the Son could not be forefaulted, as having murdered his Mother, under Trust, for they found that, not to be the Murder, which is declared Treason by the *11. Par. cap. 51. Fa. 6.* For the trust there mentioned is, when such as came under the trust of others, were persons who would not have come within their reach, without special assurance of indemnity, and protection; and it is related as a received tradition amongst us, that this Act were first made upon *Mack-donald*, his killing the Laird of *Mack-clane*, who came to lodge with him, upon such assurance; notwithstanding of the feids which were amongst them, It were likewise improper to say, that the Mother was under the power and assurance of the Son; and if the power, and assurance betwixt Parents and Children, could fall under that Act, *Par.*

12. *Id.* 6. this Act had been unnecessary, and there could have been no place for the pain therein contained; for the Estate of the Traitor belongs to the Fisk, and not to the nearest Collateral.

III. It may be doubted, if this Act should be extended to Parents killing their Children; and albeit the Statute does not, *interminis*, expresse Descendants: yet it is probable they may fall under its Sanction: Even as the foresaid Text, in the Civil Law is extended to equal degrees, with these expresse, *ob paritatem rationis*. And by that Law, the killing of Ascendents, or Descendents, is Paricide, ὁ ἀνδρὸς, ἀνιούτα, καὶ γυναικὸς. And the Rubrick of this Act, runns generally against Paricide: nor can it be denyed, but Paricide is committed by Mothers against their Children, and Women daily are convict thereof.

Whether the foresaid Statute against Paricide can be extended, to degrees of Affinity, as well as degrees of Consanguinity; so that to kill a father-in-law, may be punished as Paricide, as well as the killing a father may be doubted: but I conceive it extends not to degrees of Affinity; because 1. Laws against Crimes should not be extended. 2. The statute discharging, Fathers, Brothers, or Sons, to judge in the causes of these relations, is not extended to brothers-in-law &c. though that extension would be more favourable. 3. Some of these relations in this statute, cannot in propriety of speech, be extended to degrees of Affinity, for we say not good-sir, or good-dame in Law, and albeit, §. 6. *inst. de publ. judic.* uses the word *adfinitatis* in this crime, yet *Theoph.* in his Greek *instit.* §. expresses the same, by the words τῆς αὐτῆς διαδοχῆς which signifies *affectionis & non adfinitatis*, and with *Theophil* agrees 36. *eclog. tit. 40.* περὶ πατρικτενῶν and this shews advantages by the Greek Lawyers.

IV. Whether it doth extend to Bastards, may be doubted;

ed; for though it be certain, that since they know their Mother, it may be therefore extended against them, if they kill her, or she them. Yet since their Father is uncertain, *nam sunt vulgo quasi, & patrem demonstrare nequeunt*; and since they have no advantage by their Father in law, it were hard the Law should punish them, as Paricides. But yet Lawyers conclude they may be punished, for *paricid.* *Allex. ad lib. 2. de injur. voc.* and since this is a Crime against the Law of Nature, it may be punished in Bastards, who are natural Children.

¶ V. This Crime extends not to Moveables by the Act, but by our Law; wherever the Law punishes by death, it implies confiscation, for Moveables followeth still the person. And by the Law of France, (from which we have borrowed this, and many other things) *qui confisque le corps confisque les biens.*

It is probable that upon this Act, even absents may be convicted of this Crime; as the Lords then thought, if the certification of the Letters, had born the Penalty here expressed. For albeit probation cannot be led, in absence of the Party, to fix a Crime upon him, yet this seems to be a civil effect; which strikes not against the person of the committer.

By the Civil Law also, all Murderers were debarred from succeeding to such whom they murdered. *l. cum ratio. §. fin. ff. de bonis damnat*, which is yet observed in France, but though with us there be no contrary decision; yet with us they are not debarred; and seeing this pain is only statuted in the case of Paricide, we may by a natural consequence conclude, that it should not be extended to ordinary Murders.

VI. By the Act 20. Parliament. 1. Sess. 1. Ch. 2. Beating or Cursing or Parents, is declared to have been punishable by the Law of God, with death: And therefore ordains, that whatsoever Son, or Daughter, above the age of Sixteen, and

not distracted, shall beat or curse his Father or Mother, he shall die without mercy, but if they be within the age of Sixteen, and past pupilarity, they are to be punished arbitrarily: From which it is to be observed, 1. That this Crime is merely statutory, and therefore should not extend beyond the degrees of the act to grand-fathers, or grand-children, albeit *appellatione filii & nepos comprehenditur in favorabilibus*. 2. That arbitrary punishment is opposed to death, and so never can be extended in other acts to death. 3. That those who are not above the age of Pupilarity, are not capable to commit crimes, nor should be punished, for they are here accounted as distracted persons, and if they were punishable for any Crimes, it behoved to be for such as are against the Law of God.

VII. It is very easy, and too ordinary for women who bear Bastards, to murder them; And therefore to obviate this, the Law presumes so far, a woman who has born a bastard, and has conceal'd her being with child, to be guilty of Paricide, if the child be found dead, that it punishes her by some extraordinary punishment, (but not by death) except she can prove that the child was born dead : Thus it was decided in *Savoy*. 1595 *vid. Cod. fab. de his qui parent occid. Def. 11.* And with us *Lawson*, and *Ramsay*, were both Scourged, *annis 1661. and 1662.* Even though they were asswylzied from the Murder: But I think that this were severe, if the woman openly acknowledged that she was with child, though none was present when she brought it forth. And in all such cases women are admitted to be witnesses.

The taking potions also, to make one part with child, *abortum procurans*, should be a species of Paricide, in my opinion, since she thus endeavours to kill her own child: and by the Civil Law, it was punished with death. *L. Cicero. ff. de penis*. And though the Doctors distinguish here, betwixt the using such means after the child is quick, or before it, making it capital in the one case, but not in the other; yet they presume that

that the child was quick, *quod fetus erat animatus*, and that *in odium delinquentis*, and burden the delinquent to prove the contrair, *Gomesi: de delict cap. 3. num. 32.* asserts that this is presumed not to infer death, but Ecclesiastick punishment; and since to prove the contrair, seems to me, impossible, I incline to *Gomesius*, his opinion: but yet the using such means, even before the birth be quick, is arbitrarily punishable, as is even the using means to hinder conception. *Marfil: ad l. si mulierem ff. de. sicar.* And in these cases, both the Physicians who administrats the cure, and the woman who takes, are equally punishable, *Marfil. ibid.*

VIII. So horrid is paricide, that what would be but a degree of guilt in other crimes, makes a compleat crime here; and thus a child's endeavouring to poyson his father, *καὶ μὴ δυνάμεν δόξαι l. 1. Basil. h. t.* and to kill parents by giving them wounds, was punisht by death in *Savoy, C. fab. h. t.* though the wounded parent interceded to the contrair. And the Son who bought poyson to poyson his father, though he was not able to give it: *Carer. S. homicidium. num. 128.* for which crime, suffered with the Son, the Phisician who furnished the drugs, *καὶ ἰατρός ἐχάτως τι μωρεῖται l. 2. Basil: h. t.* and the person who lent the son the mony to buy them: but regularly these strangers are not capitally punishable for such an accession, except the crime take effect: and this is the present custom of nations, though by the *Roman Law*, and the *Basilicks*, they who were conscious, or lent the money, or were surety for money to be so bestowed, were guilty, *ὁνειδισσας δανεισας αὐτῷ καὶ ὁπῆς αὐτῷ ἀσφαλισαμενος.* And yet he who Commands a son to kill his father, is not guilty of Paricide, *Capol. Consil. 36.* which may seem strange, since to give poyson to kill a father, seems equal guilt, to giving a Son command to kill his father. As these circumstances heighten Paricide, so there are some which restrict the punishment, as if the father should find that his son had lyen with his own mother-in-law, and had killed him upon that accompt, though

though not in the very act, ὁ πατὴρ τοῦ υἱοῦ μοχλευσάτην αὐτὴν γα-
μῆτην καὶ περιόρισθαι Lawyers think, that he should be only pu-
nished by banishment, but not by death, and that generally for
whatever crime, or fault, a father may exheredat a son, that
the same fault will excuse the father from death if he kill his
son. *l. divus ff. de paricid & Cabal. cas. 15.* Some also think
that a woman killing her husband who is banished, and upon
whose head a Fyne is put, is not punishable by death, because he
husband is, *nullus injure*, and Laws allow all to kill such a
person, without any distinction betwixt wives or others: yet
other Lawyers have concluded, that she should be punished by
death, since such sentences, loose not the wifes natural obli-
gations, but he is still her husband, and the Law
owns so far the relations, as not to punish her for
omitting to kill him, or for cohabiting with him. *Cap.
consil. 278.* A father killing his son by accident, ought
not to dye, and therefore, much lesse he who kills
him in defence of his own life, for self-defence is a du-
ty.

This crime is so odious that it præscribes not. οἱ πάντες τὸν
αὐτὸς καθήγορευται

TITLE

T I T L E X I V.

Incest, Sodomy, Bestiality.

1. *What Incest is, and the several kinds thereof.*
2. *The punishment of Incest by our Law.*
3. *Sodomy, how punished.*
4. *Bestiality, how punished.*

Incest is defined by the *Civilians*, to be, *fada & nefaria maris & femina commixtio, contra reverentiam sanguini debitam.*

Incest is divided into two branches, *viz.* that which is committed against the Law of Nature; and into that which is committed against the Municipal Law of the Countrey. All copulation betwixt ascendants and descendants, such as Grandfather, Father, Mother, Son, Daughter, &c. is by all acknowledged to be Incest against the Law of Nature. But it is controverted, whether the Brothers lying with the sister, be incest against the Law of Nature: And the *Roman Catholicks* alledge it is not, Because it was allowed at the beginning; and therefore they conclude that the Pope may dispense therewith; And this is the first difference betwixt that Incest which is committed against the Law of Nature, and that which is committed against the Municipal Law.

The second difference betwixt them is, that the pain of incest when it is committed against the Law of Nature, is death: but when against the Municipal Law, it is only deportation, *5. ff. de quest.*

The

The third difference is, that Incest committed only against the Municipal Law, is excused (in a woman, *in figura matrimonii*) but ignorance of the Law of Nature is not; But the man is inexcusable in either, *Mathews hoc tit. Num. 5.*

The fourth difference is, that if a Marriage contracted, be rescinded, as incestuous, all the committers goods are confiscat, if the Incest be committed against the Law of Nature: but the Tocher and Joynter are only confiscat, if the Incest be only committed against the Municipal Law, *Mathews.*

II. Our Law does not observe the above-written distinction, but it is universally, *Statut. act 14. p. 1. f. 6.* That whosoever pollutes his body with such persons in degree, as Gods word doeth contain in the 18. of *Leviticus*, shall be punished with death; Albeit by these words of the act whosoever abuses his body, it would seem that such as actually copulat, are only punishable by this act: Yet I think *nudus conatus*, or endeavour, is punishable by death, as it is in Sodomy; in which, endeavour is punishable, by the opinion of the Doctors, though by the Law of *England*, Sodomy requires *habuisse rem veneream, & puerum carnaliter cognovisse*, *Cook. p. 59.* albeit the manner of death is not exprest in this act, yet practitioners hath determined the same, to be hanging; as in the case of *Barnoch*, who was hanged for committing Incest with his own Sister, *Decemb. 8. 1641.* And of *Jean Knox*, who was hanged for committing Incest with her husbands brother *May 1646.* Sometimes it is likewise punished with heading, as in the case of *James Strang*, who was beheaded for committing Incest with his brothers daughter, the 4. of *April. 1649.*

III. *Sodomy*, is when a man lyes with a man, for which both are punishable by death, *l. cum vir nubet. C. de adult.* they are buint in *France* and *Savoy*, as *Gothofred* observes. By the 25. act: *Henry the 8.* Sodomy is declared Felony, and the punishment of Felony by the Law of *England*, is in all cases to be hanged

hanged by the neck till death.

Though *Carpzovius*, and the other Doctors, are of opinion, that confession alone is not a sufficient probation in this Crime, except other presumptions concur for clearing that the Crime was truly committed, yet with us the confession it self, without any other adminicles, is sufficient to infer the punishment of death except the confessor be known, or at least suspected to be distempered.

Mastrupatio est ubi quis propriis manibus aliove instrumento se polluit & punitur ut sodomia. Carp. Part. 2. Quest: 76. hac pena non est in usu apud nos.

IV. Bestiality is, when a man lyes with a beast, which the *Romans* also punished with death, and in which some Lawyers affirm the endeavour is as highly punishable, as the crime it self, *effectus sine affectu*, *Papon. lib. 22. tit. 7. art. 1. Damhau. cap 96. n. 16.* Which opinion they found upon the atrocicy of the Crime: and it seems that he deserves not to live, who could harbour such horrid thoughts, but especially if he did all that was in his power to put his design in practice, and was only letted by some interveening accident, *οι αλογευομενοι ητοις κτηνοβατι*. But yet other Lawyers conclude, that even in this crime the endeavour is punishable by a less severe punishment then death: which seems clear by *l. 1. §. fin. ff. de extraord. crim. qui puero struprum abducto ab eo vel corrupto comite, persuaserit, aut mulierem puellamve interpellaverit, quidve impudicitia gratia fecerit, perfecto flagitio punitur capite, imperfecto in insulam deportatur.* And though in hotter Countreys, where Custome, and Climat, lessens this Crime, the Crime is by their Lawyers thought punishable less severely; yet with us death ought to punish it, if the delinquent was only letted by others.

And in both thir crimes of Sodomy and Bestiality, witnesses who are lyable to exceptions will be received, because of the atrocicy of the crime. *Bof. de judiciis.*

We have no particular statute for punishing either Sodomy,

or Bestiality, for they are crimes extraordinary, and rarely committed in this Kingdom: but our Libels bear, That albeit by the Law of the Omnipotent God, as it is declared in the 20. c. of *Leviticus*. *As well the man who lieth with mankind, as the man who lieth with a beast, be punishable by death.* Yet &c. the ordinar punishment in both these, is burning, and the beast is also burnt, with which the Bestiality is committed: as in the case of *James Fiddes*, who being convict of Bestiality, was ordained to be burnt in the last of *May*, 1650. And Major *Weir*, *April*, 1670. Yet sometimes it is only punished by hanging, and thus *John Logie* was only hanged in *July*, 1642. and *James Wilson* was only hanged for the same crime, 15. *Feb.* 1649. which last Sentence bore, that the execution should be very early in the morning, and ordained the Mare with which the Buggery was committed, to be drowned in any Mosse or Loach,

TITLE

TITLE. XVI.

Raptus, Ravishing.

1. *The nature of a Rapt described, and its punishment.*
2. *Whether the violent lying with a woman, without the carrying her away, be a Rapt.*
3. *If the carrying a woman away upon any other account than lust, be a Rapt.*
4. *If the carrying her away without lying with her, be a Rapt.*
5. *If a womans carrying away a man, be a Rapt.*
6. *Whether a subsequent consent purges this Crime.*
7. *Some instances of the punishment of this Crime.*
8. *Whether the parents consent, not being obtained, makes a Rapt.*
9. *Whether minors, and such as force common whores be punishable for a Rapt.*

Rapt or Ravishing, is that crime, which is committed in the violent carrying away a woman from one place, to another, for satisfying the Ravishers lust: And is in the Civil Law punishable by death, *L. un. C. de Rapt. virgin, &c.* In our Law, it is one of the four points of the Crown, that is to say, the cognition of it belongs only to his *Majesties* Justices, and not to any other judge; *R. Maj. l. 1. c. 1. N. 6.* and is punishable by death, and confiscation of the Committers movables. For albeit I remember not that the punishment of death be expressly appointed for it; Yet in the *8 cap. l. 4. R. M.* It is said expressly that it shall be punished as the other Crimes above related, and these are Murder, Treason, and fire-raising;

or Bestiality, for they are crimes extraordinary, and rarely committed in this Kingdom: but our Libels bear, That albeit by the Law of the Omnipotent God, as it is declared in the 20. c. of *Leviticus*. *As well the man who lieth with mankind, as the man who lieth with a beast, be punishable by death.* Yet &c. the ordinar punishment in both these, is burning, and the beast, also burnt, with which the Bestiality is committed: as in the case of *James Fiddes*, who being convict of Bestiality, was ordained to be burnt in the last of *May*, 1650. And Major *Weir*, *April*, 1670. Yet sometimes it is only punished by hanging, and thus *John Logie* was only hanged in *July*, 1642. and *James Wilson* was only hanged for the same crime, 15. *Feb.* 1649. which last Sentence bore, that the execution should be very early in the morning, and ordained the Mare with which the Buggery was committed, to be drowned in any Mosse or Loach,

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TITLE. XVI.

Raptus, Ravishing.

1. *The nature of a Rapt described, and its punishment.*
2. *Whether the violent lying with a woman, without the carrying her away, be a Rapt.*
3. *If the carrying a woman away upon any other account than lust, be a Rapt.*
4. *If the carrying her away without lying with her, be a Rapt.*
5. *If a womans carrying away a man, be a Rapt:*
6. *Whether a subsequent consent purges this Crime.*
7. *Some instances of the punishment of this Crime.*
8. *Whether the parents consent, not being obtained, makes a Rapt.*
9. *Whether minors, and such as force common whores be punishable for a Rapt.*

Rapt or Ravishing, is that crime, which is committed in the violent carrying away a woman from one place, to another, for satisfying the Ravishers lust: And is in the Civil Law punishable by death, *L. un. C. de Rapt. virgin, &c.* In our Law, it is one of the four points of the Crown, that is to say, the cognition of it belongs only to his *Majesties* Justices, and not to any other judge; *R. Maj. l. 1. c. 1. N. 6.* and is punishable by death, and confiscation of the Committers movables. For albeit I remember not that the punishment of death be expressly appointed for it; Yet in the 8 *cap. l. 4. R. M.* It is said expressly that it shall be punished as the other Crimes above related, and these are Murder, Treason, and fire-raising; which

which are all capitally punished. And by the *Act. 4. P. 21. F. 6.* it is declared, that albeit the consent, and declaration of the woman ravished, declaring that she went away of her own free will, may free the committer from capital punishment: Yet shall it not free him, from such arbitrary punishment as His Majesty shall inflict, by Warding, confiscation of their goods, or imposing upon them pecunial mulcts. Which act insinuates that the Crime is otherwayes Capital, else that act had been unnecessary.

II. The definition given of a Rapt, *l. 4. c. 8. R. M.* is, that it is the unjust oppressing of a woman, by a man, against the Kings peace, in which it differs from the Civil Law, at least from some Doctors, who alledge, that lying with a woman, or abusing her body violently, is not a Rapt, except she be carried from one place to another: Albeit they do confesse, that this violence is punishable by deportation, or banishment, and is, as some affirm, *non Raptus, sed Stuprum, l. 3. C. de ad leg. Jul. de vi.* But yet other Lawyers, and chiefly *Mathews*, doe conclude, that albeit the away taking, and the forcing, or violent abusing a womans body, be differently punished, yet they are degrees of the same crime, and both are Rapts: But according to our Law, both are Rapts, and both punishable by death. Neither does our Law make any distinction, *inter Raptores, et deforciatores mulierum*, betwixt Ravishers, and Detorcers of women; and it were most unreasonable, that he who deflowers a woman violently, should not be as severely punished, as he who only carries her from one place to another: for as the person ravished looses more by that abuse, then by her transportation; so it were absurd, that *apparatus ad crimen*, should be more severely punished, then *effectus criminis*; that the accomplishment of the crime should be a lesse guilt then the preparations to it: amongst which this transportation is but one.

III. If the woman be taken away upon any other accom-

then that of lust, it is not a Rapt, and so if she be very old, or if the away-taker had a quarrel against her, it is not a Rapt, *Deus concil.* 234.

IV. *Quæ.* What if the Ravisher did not carnally know the person Ravished, whether in that case, the away-taker be punishable as a Ravisher capitally? and albeit the ordinar distinction be, that if he did not, because he could not, then he is punishable: but if it was in his power to have deflowered her, but abstained, then he is not to be punished capitally, but only arbitrarily. *Clar. S. raptus num. 4.* Yet I think, that in our Law he is in no case to be punished capitally, except he deflowered her: For 1. In the foresaid 1. *cap. l. 1. R. M.* it is said, that *affectus sine effectu*, is punishable in Treason, because of the great wrong done to the whole Kingdom: but this reason ceaseth in Rapt, and when Rapt is spoken of, in the immediat next Verse, this is not repeated. 2. The glosse upon the word, oppressed by a man, *l. 4. c. 8.* interprets oppression to be suppression, or corruption, and in the 9. Verse of that Chapter, it is rendered corruption, and it is spoken of there, as *sedatio mulieris & pollutio*. 3. By the Norman Law, with which our old customs have much contingency, Rapt is called *depucellement des femmes a force*, *l. 12. c. 1.* Yet I think that any such wrong done to a woman, is punishable, *tantum in suo genere*, and after the crime of Rapt, or Ravishing is spok of in that chapter, it is said *v. 8.* That if a woman accuse a man of any other wrong done to her body, she will be heard.

In that Chapter also, it is appointed the woman Ravished go whilst the crime is recent to the next Town, and there shew to honest men the blood, or other wrongs done her, and thereafter go to the Mair of the Lordship, or to the Toscheoderoch, which *Skeen*, *ad. R. M. l. 1. c. 6.* interprets to be *Serjandus*; but *Boeth*, in his History calls them *latrunculatores*, or the keeper of thieves: And thereafter to the Sheriff, and last of all

all to the Justice: But the form now is only to raise Letters, as in other crimes, before the Justice. And albeit of old, she was obliged to insist within 24. hours, *intra unam noctem*, else not to be heard, *c. 10. l. 4. R. M.* Yet that is now antiquated by custome; Albeit it was a strong presumption in the opinion of the Doctors, and is so in our practick, that the pursuit is malicious, when it is delayed; for it is most presumable, that a woman would not conceal any time such an injury.

V. It is doubted much among the Doctors, if women who ravish men are punishable as ravishers; And albeit our Law speaks still of ravishing women, yet I think that as women are guilty of man-slaughter, so women may be guilty of this crime: and by the *9. v. c. 8. R. M.* It will appear that this was designed for both Sexes: Albeit I think it be not punishable by death, seeing it cannot take effect, except the man pleases, & *affectus sine effectu non punitur capitaliter, in hoc crimine.*

VI. By the opinion of Lawyers, the subsequent consent of the women ravished, did not absolve the committers, *Cin. in l. un. h. t.* And albeit by the Council of *Trent*, Marriage may be contracted lawfully betwixt them, yet the committer is still punishable; and by the foresaid Law *C. de raptu*, the words are, *nec sit facultas raptae raptorem suum sibi maritum exposcere.* But by the foresaid Act, *F. 6. P. 21.* this question is determined with us, for that consent only saves from capital punishment, for the committer may be put to the knowledge of an inquest, either at the instance of his *Majestie's* Advocat, or the Parents or nearest kin, from which Act it may be observed, 1. That the Advocat or nearest of kin may insist, without one anothers concurrence, 2. That if the nearest of kin do not insist, they who are in remoter degrees cannot insist in this case, and crave that the Ravisher may be put to the knowledge of an Assize, although the woman declare that she was not ravished, Albeit I think that before any such consent be declared, any of her friends may in-

first, *l. un. C. de rapt, & si pater injuriam remiserit extraneus reum postulare poterat.* 3. Except it be proved that the rapt was committed at first, without consent of the woman, and nearest of kin, it is most punishable. It may be argued, that if either the nearest of kin, or she, consented before the rapt, it is not punishable: and it is probable, that if the nearest of kin consented, though the woman did not, the away-taking is not capitally punishable; for where the nearest of kin, and parents consent, the ravisher deserves not so severe a punishment as death. 4. Because the womans consent is so hard to be known, for she might have at first consented, albeit she cryed or resisted upon designe: Therefore I think her Oath should be first required, and if she be content to swear that she went willingly alongst, that should, in my judgement, preclude the pursuers from any further pursuit; or if they can prove that there was any designe of marriage amongst them, previous to the away-taking, *Marfil: consil. ibi de Boss. de rapt. N. 17.* 5. Since by the foresaid Act, it is said, that if any be pursued as art and part of rapt, the womans consent in that case shall free them from capital punishment: it may be doubted if the womans consent will free from capital punishment, him who is pursued as principal actor, since the Act is not expresse as to him, and since he deserves not so much favour as the complices do: But yet I conceive the same favour should be extended to him, both because our Law equals principals and complices, and because the Doctors, and the Laws of other Nations extend this: Before this Act by the 8. *cap. R. M. l. 4.* And yet it is declared there, that it shall be lawfull to the parties to marry with His Majesties consent, the Arbitrary punishment allowed his Majesty by the foresaid Act of Parliament, *F. 6.* is not interpret so, that his Majesty should be personally consulted, but His Majesties council supplies that in his absence; as was found in the Baxters case, 1666.

Albeit this crime be capital, and that *William Bannatine* was hanged for taking away the Laird of *Achingiers*, daughter, 5. July 1596. yet I find that *Fohn Kincaid* having come in the Kings will, Feb. 1601. for ravishing *Isobel Hutchison*, a widow, the King only fined him in 2500 Merks. *Hary Speed* was hanged 20. Feb. 1639. *quia laceravit pudenda pueri*, which crime, *Ful. Clar. Gothofred*, and others, affirms to be also capital in these Countries.

I find one *Leivtenent Ker*, pursued for ravishing and away taking *Robert Cuninghame*, 6. Feb. 1640. but this is rather a species of *Plagium* then of Rapt.

VII. Since minors are punishable by death for adultery, much more ought they to be punishable by death for a rape, since the injury is there both more atrocious, and more unnatural; and *Carp. part 2. Quest. 75.* gives us several instances where this Crime was capitally punished in minors, where he likewise tells us, that to force even a common Whore is capitally punishable, though it may seem that they are *infra legem observantiam*, and they ought not to have the protection of the Law, who offend against it.

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TITLE XVII.

Adultery.

1. *The definition of Adultery, and whether the lying with an unmarried woman, or with a whore, be Adultery.*
2. *The punishment of Adultery, by the Law of God, and our Law.*
3. *The differences betwixt single and nottour Adultery.*
4. *Whether death can be inflicted for single Adultery in Scotland.*
5. *Whether the Mariage ought to be proved.*
6. *Who can be punished as accessories in Adultery.*
7. *What probation is requisite in Adultery.*
8. *Whether a Dicreet of Deworce before the Commisaries is sufficient to prove Adultery in a criminal case.*
9. *Whether he who hearing his wife was dead, married another, be punishable as an Adulterer.*
10. *Whether a pursuite being intended for nottour Adultery, and single Adultery, only proved, if the single Adultery can be punished in that case.*
11. *How adulterous children succeed.*

Adultery is a Sin, whereby men not only violat the second Table, in wronging their neighbour, by stealing from him his quiet, his good name, the affection and person of his wife, endeavouring also oftentimes to steal his estate for the adulterous

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children; But is likewise a breach of the first, in breaking that vow which was made to God in marriage, and contemning that holy and mighty Majesty, who was then called upon, as Judge and witness.

I. *Adulterium est vitatio alterius thori*, the violation of another's bed, and is committed by a married persons lying with an unmarried, or an unmarried person lying with one who is married. For albeit by the Civil Law when a man who was married, did lye with a woman who was free, that was judged to be no adultery; And albeit the lying with a Whore, by the Civil Law, was judged no Adultery, *l. 22. Cod. hoc tit. Si ea qua se protibi cognita est & passim venalem formam exhibuit ac prostitutam meretricio more vulgo se praebeuit adulterii crimen in ea cessat*. Upon which Law the Doctors conclude, that though he who first debauched a woman with adultery, be punishable as an adulterer yet these who did thereafter debauch her, cannot *Farr. Quest. 141. num. 85*. Yet this is against both the Law of God and our Law, for the Lying with another mans wife is still Adultery, but so it is, that though she be a whore, yet she is another mans Wife. Nor is the marriage dissolved by the Adultery; And yet I think, that if the woman with whom the adultery is committed, was at the time when the same was committed, living as a common whore, and the committer was a single man, who knew not of her being married, his punishment should be somewhat moderat upon that account; But if the committer was married, the crime is the same, whether the woman was a Whore or not, since it is still a violation upon the mans part. To lye likewise with a mans betrothed, or promised Spouse, or as we say, his affidar Spouse, is Adultery, *nam. nec violare licet matrimonium, nec spem matrimonii l. 13. §. diu. 6. ff. h. t.* which agrees, as I conceive, with *Deu. 22. 23*. Where he who lies with a betrothed Virgin, should be stoned as an adulterer, because, sayes *verse 24*. he lies with his neighbors wife. And he who lies with a betrothed Virgin, who is

to be shortly married, renders the succession as doubtful as he who lyes with a married wife.

The punishment of Adultery by the Civil Law, was death, as some think, by the Julian Law, *relegatio*, or banishment, as others think; but certainly the pain of death was the punishment to be inflicted, by that excellent constitution, *leg. quamvis Cod. hoc. tit.* Albeit thereafter *Justinian* died by the 134. N. cap. 12. remit to the woman the pains of death, and ordain her only to be imprisoned in a Monastery.

By the Law likewise of most Nations, adultery is only punishable by pecuniary mulcts: Albeit by the Law of God it was punishable by stoning both man and woman to death, 20. *Dent. 22.* Which punishment some think likewise to have been abrogated by our Saviour, because when the woman accused for adultery was brought before him, he did dismiss her without any punishment; but this is very groundless, for our Saviour came not to be a Judge in such causes, as himself declares: and though he had been a Judge, yet she wanted an Accuser.

III. Our Law divides Adultery, in that which is notour Adultery, and single Adultery. Notour Adultery is by the 74. *Act Parl. 9 2 Mary*, declared to be punishable by death, after premonition is made to abstain from the said manifest and notour Crime; which premonition had its origin from *Auth. si quis C. ad l. 1. de adult.* by which it was lawful for the Husband to kill him who was thrice premonish'd not to converse with his Wife. And in effect, the design of that Act was only to punish a horrid abuse, which was then ordinar, *viz.* the taking away other mens wives, and keeping them openly as their own, to the great contempt of Law. Yet by the explication of this Act, which is given by the 105. *Act, 7. Parl. 7. 6.* That is only declared to be notour Adultery, where, 1. There are Bairns one or moe procreated betwixt the Adulterers. 2. When they keep company, or bed together notoriously known. 3. When they are suspected of Adultery,

and thereby gives slander to the Kirk, whereupon being admonished to satisfy the Kirk, they contemptuously refuse, and for their refusal they are excommunicat: It either of which three degrees be proved before the Justices, the committer are punishable by death. From which Act it is to be observed, 1. That though by the first Act premonition to abstain was still to be made in all cases, yet in neither of the two first cases here related it is declared necessary. But since it was unlawful to kill him who was premonished, and thereafter conversed, except they conversed in suspect places, *Gribald. de homicid. num. 11.* It seems that in neither of these Statutes conversation should be criminal, even after prohibition, except it be in suspect places. 2. The Justices are only declared to be Judges of the notoriety of Adultery, and therefore it may be controverted, if Lords of Regality be Judges competent to the cognition of it. 3. This Act does not exclude capital punishments in other cases of Adultery, but only ordains that these three degrees shall be punished by death. And since there are other cases more grievous to the party injured, and more scandalous to the Common-wealth; it may be argued, that the punishment of death should likewise be extended to them; as for instance, to commit frequent Adulteries: And it appears it is upon this account that the sentence of death was pronounced against Sir *John Stewart*, for three Adulteries, 15. August 1628. As also, *Isabel Hamiltoun* being pursued in July, 1647 for Adultery, and having enacted her self never to return, under the pain of death; she having thereafter returned, was immediately, without any other Process, by an order from the Justices, execute in Anno 1649.

IV. And albeit there be no express Law for inflicting death in other cases, upon ordinary Adulterers, yet I see no reason why the Justices may not as well, for the good of the Common-wealth, inflict death, without any express Law here, as they do in Theft, and other less Crimes: And in effect, Adulterers include

includes Theft, as I said formerly; And albeit *inclusio unius est exclusio alterius*, and that it may be argued, that by the former Act, appointing death in the cases above-cited, the punishment of death is thereby excluded in other cases: yet to this it may be answered, that the foresaid rule is only a Brocard, and hath only the strength of a presumption and therefore take only place in favourable cases, but should not be extended in prejudice of the Law of God, which expressly ordains Adulterers to die. And in the foresaid 74. Act, 9. Parl. 2. Mary, It is declared that this Act shall be but prejudice of all other Acts and Laws already made, with all rigour; but I can find no other Act made prior to that anent Adultery, whereby the punishment is limited; and therefore I believe that that Act relates to the punishment related to by the Law of God: At the least I think that the Magistrate is left to his own freedom to consider circumstances. And whereas it may be alledged that if single Adultery were punishable by death, these Acts had been needless. To this it may be answered, that the design of the former Acts was to necessitate the Magistrate always in the cases express in that Act to inflict death, and not to empower them only to do so: And seeing single Adultery is punishable by the Magistrate, sometimes by banishment, as in the case of an English woman, in December 1668. sometimes with scourging, as in the case of Ridpath, December 1642. And sometime with fining, as in the case of that woman who committed Adultery with George Swintoun, in Anno 1666. though there be no express Law warranting them to inflict these punishments, and whereupon the Pursuer is forced to found his Summonds upon the Law of God, and Law of Nature, upon which Law they are sustained, without citing any Municipal Law, as in the case of that English woman: I see no reason why they may not by the same Laws inflict likewise the punishment of death. Albeit the foresaid punishment of death be appointed in cases of notour Adultery; yet the Council does use to mitigate the

the punishment, and so they ordained only *Ridpath* a Tinker, though he was found guilty of double Adultery, in keeping another Tinkers Wife two years, to be only scourged, banished, and burnt on the cheek, *Decemb. 4. 1662.* But the reason here was, because Tinkers are in effect vile persons, who are seldome ever lawfully married: And in such I find of old, Adultery was not punished by death, as *l. 29. C. b. t.* where Adultery committed with a Taverner is not punished severely, *quas vita vilitas dignas legum observatione non credit, & erant infra legum curam.* And some respect was likewise had here to that absurd custome amongst Tinkers, of living promiscuously, and using one anothers Wives as Concubines. The Council sometimes do likewise banish persons for Adultery, without suffering them to come before a Justice Court, even where notour Adultery might be proved against them, as in the case of *Feals Thyre* an English man, for committing Adultery with *Margaret Hamiltoun*, who at her death confessed that the said *Thyre* had lyen several years with her, and that he had alienat her affection from her Husband, which induced her, though without his accession, to kill her Husband, and that she had several Children by him; all which in effect were great aggravations of the Crime, and he deserved well to have dyed. From this it appears that the punishment of ordinary Adultery is arbitrary, and useth to be inflicted, either by banishment, whipping, fynyng, or imprisonment. If a person be only banished for Adultery, and return again without leave here, she may be execute; and thus the Justices found by advice of the Council, in the case of *Grissel Hamiltoun*, *Decemb. 1649.* Or if Adultery be complicated with any other Crime, the guilt is thereby aggraged, and the Crime may be capitally punished; Thus *Margaret Thomson* was execute for committing Adultery with a Minister, and for falsifying a Testimonial, to the end she might get her Child Baptized, *May 28. 1646.*

V. Since Adultery is only committed betwixt married persons, it is therefore requisite that the Libel in Adultery bear, that such persons were married: and one of the ordinary faults committed by the Pursuer in this Crime is, they seldom ever lead Witnesses for proving the marriage, without which be proved, or be notour to the Assize, they should not fyle the Pannel, though Copulation be proved. But though the marriage be not just, but only a supposed marriage, or *matrimonium putativum* (as Lawyers call it) yet the violation even of that marriage, will inter Adultery. As for instance, if a man not knowing the relation, should marry within the degrees *de fendant*; though there be in that case no lawful marriage, yet if either of these parties who are married, should ly with any other, they will be guilty of Adultery, *Cravet, Consilio 205. num. 36.* The reason whereof is, becaule the committer did all that lay in his power to commit Adultery, which is the main thing to be looked to in Crimes, *nam proposita maleficia distinguunt.* And from this I am much inclined to think, that *conatus*, or an endeavour to commit Adultery, if the Adulterer did all that in him lay to accomplish the said design, makes the committer guilty of Adultery, if that design was brought to the length of being *in actu proximo*, as Lawyers call it: though in that case I think the rigour of the ordinary punishment should be somewhat remitted: & *hac attentatio est punienda pana extraordinaria iudicis arbitrio. Tira-quell. de panis, Cas. 39. & 40.* He who allow'd his house to the Adulterers for perpetrating their Crime, is punishable as an Adulterer, and he who gave them the use of his house for consulting about the committing of it, though it was not committed, is punishable as an Adulterer, *ἀνισχὲς τιμοποιεῖται, Basil. l. 11. h. t.* He who receives his wife, after he finds her committing Adultery, and lets go the Adulterer, is punishable as a Pimp, *l. 30. ibid.* but this is not in observance with us, except the Husband took money to conceal the Adultery, and therefore that Law doth well

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V. Since Adultery is only committed betwixt married persons, it is therefore requisite that the Libel in Adultery bear, that such persons were married; and one of the ordinary faults committed by the Pursuer in this Crime is, they seldom ever lead Witnesses for proving the marriage, without which be proved, or be notour to the Assize, they should not fyle the Pannel, though Copulation be proved. But though the marriage be not just, but only a supposed marriage, or *matrimonium putativum* (as Lawyers call it) yet the violation even of that marriage, will infer Adultery. As for instance, if a man not knowing the relation, should marry within the degrees *defendant*; though there be in that case no lawful marriage, yet if either of these parties who are married, should ly with any other, they will be guilty of Adultery, *Cravet. Consilio 205. luum. 36.* The reason whereof is, becaule the committer did all that lay in his power to commit Adultery, which is the main thing to be looked to in Crimes, *nam proposita maleficia distinguunt.* And from this I am much inclined to think, that *co-latus*, or an endeavour to commit Adultery, if the Adulterer did all that in him lay to accomplish the said design, makes the committer guilty of Adultery, if that design was brought to the length of being *in actu proximo*, as Lawyers call it: though in that case I think the rigour of the ordinary punishment should be somewhat remitted: *& hac attentatio est punienda pena extraordinaria judicis arbitrio. Tira-quell. de panis, Cas. 39. & 40.* He who allow'd his house to the Adulterers for perpetrating their Crime, is punishable as an Adulterer, and he who gave them the use of his house for consulting about the committing of it, though it was not committed, is punishable as an Adulterer, *αἰμιχ & τιμοποιται, Basil. l. 11. h. t.* He who retains his wife, after he finds her committing Adultery, and lets go the Adulterer, is punishable as a Pimp, *l. 30. ibid.* but this is not in observance with us, except the Husband took money to conceal the Adultery, and therefore that Law doth well

well determine, that he who remits the injury for money, *ἢ κερδὲς διαμειχρίαν λαβὼν*, is punishable as an Adulterer, but not he who remits it freely.

VI. He who gives warrant, and order, or hires others to commit Adultery, is guilty, and deserves the same punishment with the Adulterer, according to the opinion of all Lawyers. And in effect, he is more guilty, seeing he wants the natural temptation of the Adulterer, and commits the Crime in effect out of meer malice, and in contempt of the Law: And therefore Lawyers conclude, that the Husband hounding out, or hyring others to commit Adultery, cannot pursue his Wife for that Adultery which he occasioned: and yet it being alleged against *Rocheid* that he could not pursue *Elizabeth* *Muir* his Wife, because in effect he had hired others to lye with her, and so was *Leno*. It was answered, 1. *Lenocinium* was only in the case, *ubi maritus questum facit de corpore uxoris*, *ἢ λαμβάνων ἀπομειχρίας τῆς αὐτῆς γυναίκος*, or keeps a Bordel, or prostitutes her for money. 2. This exception could only exclude the Husband from pursuing a Civil suit of Divorce, but not from pursuing a Criminal suit for Adultery. 3. Though it excludes the Husband from a Criminal pursuit, it could only exclude him from such a Criminal pursuit, as was intended upon these acts of Adultery to which she was tempted, or which she committed with her Husbands consent, but not from pursuing her upon such Acts as she had committed formerly, without her Husbands knowledge. 4. The Advocat concurred in this case, who, nor the public interest could not be prejudged by any connivance or crime of the husband: In respect of which reply the defence was repelled. But to examine this *Interloquutor*, It is certain that the fourth reply was *per se* relevant, for certainly the Advocat might have concurred without the Husband, the Lybel being conceived in the Advocats name, as well as the Husbands, but not other ways: But as to the other replies, I think the

were not relevant *per se*, for it were most unjust that the Husband should have liberty to pursue that as an injury, which he himself had occasioned, nor should he be allowed to call that an injury done to his wife, the like whereof he himself had solicited with money; And seeing in Law, that Husband who consents to his wifes adultery, is called *Leno*, or *Pimp*, much more should he be reputed guilty of being a Pimp or Baud, who invites and hires others to lye with his wife; and certainly as it is a greater crime to hire others to lye with a woman, then to lye with her himself, because there is not so great temptation in the one as in the other, so certainly there is more of crime and malice in giving money, then in taking money in this case, since money may be taken out of poverty, whereas it never can be given without malice.

Lawyers relate, the case of a French Man, who to prove Adultery against his wife, did geld himself, and did let witnesses see he was gelded, whereupon his wife being with child 15. Moneths thereafter was pursued by him for adultery: but since this was an unlawful mean of probation, I would not have allowed it, if the pursuit had been at the Husbands instance, and though it had been at the Fisks instance, yet since the woman was so much tempted, I would only have punished her moderately.

VII. Adultery is ordinarily committed so privately, and so removedly from all witnesses, that the Law allowes it to be proved by strong and violent presumptions, as the being in bed together alone, and being naked, *Farin. quest. 136. cap. 1.* And the ordinary presumptions probative in this case are, the being oft alone together, gifts, love-letters, closd doors, the Wifes being abroad all night, *nudus cum nuda*, & *solus cum sola*, the intertaining persons that are known to be Pimps, or habitation, all which are presumptions, which according to the opinion of the Civilians, may infer torture, though it be not used with us, yet it is most ordinary for Assizes to syle

Pannels upon those presumptions, with the assistance of any other probation; and in *George Swintouns* case, a woman was there filed of adultery, though nothing was proved but that the pairties were alone, and that the witnesses heard them in bed together, and the bed shake: And in the case likewise of *Elizabeth Muir*, it may be seen that she was condemned upon pregnant presumptions, without a formal probation.

Albeit women cannot be admitted witnesses, yet they are received in adultery, as in the foresaid Procets against *Elizabeth Muir*, anno, 1668, and the Lords of Session after solemn debate, found that two witnesses seeing successively the crime committed, though they did not see it at one time, yet they were sufficient witnesses to infer the crime; albeit it was alleged they could not be called *contestes*, Feb. 1666. Lady *Miltoun* against the Laird.

Adultery may be pursued either Civilly to obtain a Divorce, or Criminally, and when it is pursued Criminally the Pursuit tends either to a capital punishment, or an extraordinary and arbitrary punishment, and according to the different nature of these conclusions, require different probation, for in Civil pursuit Lawyers do allow: and the Commissaries have found in the foresaid case of the Lady *Miltouns*, that Witnesses deponing that they saw the persons lying together naked in a bed, and that one Witness deponing upon an Act at one time, and another upon another Act committed at another time, did prove sufficiently, which (as some think) would hardly have been sufficient in a Criminal pursuit, seeing in effect these Witnesses were but single Witnesses, and their senses did not here agree in one and the same object, which is the reason why Witnesses are believed.

VIII. It may be doubted here whether a Decreet of Divorce before the Commissaries be sufficient to prove Adultery in a criminal pursuit, as a Decreet of improbation before the Lords, is sufficient to infer falshood: And for clearing of this question, It is answered, that 1. Seeing the proba-

tion.

tion of Single adultery is sufficient to infer a divorce, it follows necessarily that the production of that Decreet cannot prove notour Adultery. And this was likewise found last July, anno. 1598. in an Action pursued by the Kings Advocat against *Alexander Hay* of *Dalgety*: And certainly there was great reason for that verdict, seeing as is very well urged there, many probations will infer single Adultery, or a Divorce, which will not infer notour Adultery and capital punishment: but yet I see no reason why a Decreet of the Commissaries should not infer the punishment of ordinar adultery, and an arbitrary punishment, seeing no probation is sufficient in the one case which cannot be allowed in the other, It beeing a rule amongst the Doctors, that *causa civilis & criminalis quo ad penam arbitrariam aequiparantur quo ad probationem*; And whereas it may be objected, that probation in Criminats, should be led in presence of the Pannel, and the Assize. To this it is answered, 1. The Decreet of Divorce is approbation 2. This may be likewises objected in the crime of falsehood, and yet the Lords Decreet is there admitted; but betwixt these two Decrees there is this difference, that the Lords may punish falsehood themselves, and so their Decreet should be a full Probation, because they are Judges competent, even to the Criminal part: But it is not so with the Commissaries, who can inflict no Criminal punishment at all for Adultery.

IX. The Civil Law did excuse a man from Adultery, who apprehending upon just reasons that his Wife was dead, married another, or the Wife who married a second Husband, l. 11. S. 12. ff. h. t. *mulier cum audisset absentem virum defunctum esse alii se junxit, & falsis rumoribus inducta, & quia verisimile est deceptam eam fuisse nihil vindicta dignum videri potest, & l. pen. dicit adulterium sine dolo malo non committi*: Upon which arose a great debate, *Novemb. 7. 1673.* for *John Frazer* being indited for notour Adultery with *Helen Guthrie*, alledged, that he could not pass to the knowledge of an Inquest,

as an Adulterer, because he had married this *Helen* lawfully, after he had got Testificats upon oath to prove that his first Wife was dead in *Virginia*, whereupon he got a warrant from the Presbytery of *Edinburgh* to marry, and was accordingly proclaimed and married: and if a false rumour was sufficient to clear from Adultery, and that there could be no Adultery without *Dole*, and a fraudulent design, as is clear by the former Laws, and by *Farin. de delict. car. quest. 140.* he could not be guilty of Adultery who had married, *Authore Ecclesia*, who is Judge competent, and who was induced thereto not only by report, but by Testificats. To which it was replied, that he is an Adulterer who lyes with another Woman whilst his Wife lives; and as rumours cannot dissolve marriage, so neither can they defend against Adultery, and if this were allowed, it were easie for every man who were weary of his wife, to raise rumours concerning her death, and thereby authorize himself in marrying another. 2. Though rumours were sufficient, they behoved to be rumours constantly and commonly reported, but here was only one Testificat, and this Testificat could be no warrant, since it was but a single testimony, nor did it bear that the said *Margarat Haily*, who died there, was known to him to be spouse to *John Frazer*, but only in general, that one *Margarat Haily* died there, and there might have been moe of that name. 3. Though rumours might excuse, yet that could only be after a long absence, & *longo tempore transacta* as is clear by the Law cited by the Pannel, whereas here she was only absent three years; and the ignorance behoved to be invincible, whereas here it was only *ignorantia affectata*, for it is offered to be proved that she stayed within twelve Miles of the Pannels fathers house, and was known by all the Countrey to live there, and though her mother, and relations lived at *Edinburgh* in one Town with the Pannel, yet he never asked at her mother if she was dead. 4. A man whose wife diverts from him, ought to summond her to adhere, and so procure a divorce by the

the Commissaries; and though rumours and præsumptions could infer a full probation, yet that must be only understood of what is led and proved before the judge ordinary, and the warrant of the Presbytery is not sufficient, since they are not Judges competent to the dissolution of mariages; and this was procured *periculo petentis*, no person being cited. Upon which debate, the Justices repelled the defence, and the said *John Frazer*, being remitted to the knowledge of an inquest, was found guilty, but did thereafter procure a remission; and thus it is clear that *Bigamie* may be also pursued as notour adultery. But the woman who knew not the first marriage was not punished, *ὡς ἐστὶν ὅτι ἐπὶ αὐτῇ γαμήσια οὐκ ἔχοντι αὐτοὶ ἐχέειν τομὴν, ἀλλὰ τὴν αὐτῇ προστάται*. *Basil. l. 85. hoc tit.*

X. It may be here doubted likewise, whether a pusuite being intended for notour adultery, and not for single adultery, & the probation which is led, be sufficient to infer single adultery, though not notour adultery, if the assize should tyle or not. For the Negative, it may be alledged, that single and notour adultery are different crimes, and the Libels are different, and the lybell in this case is not proved, and therefore the assize should not file, and if they do, their sentence is null; even as in the case of *George Grahame*, where the verdict of the Assize was reduced, because Theft was lybelled and receipt of Theft only proved. As also in that case the defender is precluded of his defences, because he would have produced defences against single adultery if it had been lybelled, which would either not have been relevant against notour adultery, or else he thought himself, *in tuto*, not to propone them, because he thought himself secure, knowing that the notour Adultery libelled could never be proved: and it is an ordinary conclusion amongst the Doctors, that *si in libello qualitates non sunt probate reus est absolvendus*. And to evite this difficulty, the conclusion in their libels uses to be alternative, yet I think that the defender should be absolved.

solved, he taking instruments upon the Libel as it is Libelled except the qualities be expressly proved; though it be most ordinary to the Justices to allow the parties to declare that they insist alternatively as said is.

By our Law, such as are Divorced for the Crime of Adultery committed by themselves, cannot thereafter marry the persons with whom they are declared by the sentence of a Judge to have committed Adultery, and all such marriages are declared null, by the *Act. 22. P. 16. f. 6.* which hath been introduced by our Law, not only as a punishment of the Adultery already committed, by lessening and narrowing their choice. But likewise as a mean to hinder any from committing Adultery, in expectation (as is too ordinary) of enjoying in a future marriage the persons with whom they have committed it. And upon which expectation, the adulterers may be probably tempted to kill the Lawful husband or wife of that person, with whom they have committed the same. In which our Law agrees with the Cannon Law, by which *non licet ducere eam in uxorem, quam quis polluit adulterio.* But it may be observed, that this only holds where there was an actual Divorce upon the adultery, prior to the marriage. And therefore a present marriage could not be dissolved, by offering to prove, that the contractors had committed Adultery during their former marriage.

This act of Parliament having declared such marriages unlawful, it did very consequentially declare, the succession to be begotten by such unlawful conjunctions, to be unlawful, to succeed as Heirs to these Parents. And I have heard it doubted, whether they were capable to receive dispositions from their adulterous parents. But I conceive as to this there is no difficulty: For though the Law make them incapable to succeed as Heirs, yet it does not make them incapable to receive a disposition: and though it may seem, that it

farther check upon the Adulterers; whose children
 could no way be gratified by those with whom they commit-
 the crime. Yet since *quilibet est arbiter rei suae*, it
 is hard to deprive a man of the use of his property, because
 he has committed Adultery.

I find that by the Civil Law such Bastards as were born in
 Adultery, or Incest (whom in the Civil Law calls *nati ex dam-
 nato coitu*) could neither succeed to their vicious Parents, nor
 be they capable of any thing by their Parents Testament,
*ita facilius paterna libido coercere posses censeatur l. Fin. C.
 de testat. lib. Bald. ad l. 1. C. de jur. Adv.* Nor could they be adop-
 ted by their Parents, *l. legem C. de na. lib.* Upon which prin-
 ciple our Parliament has been induced to make the 117. *Act.*
 12. *Ch. 6.* but has stretched it a little further, then the
 Civil Law did. For by that statute, a woman divorced for
 Adultery, marrying thereafter the person with whom she
 committed the Adultery for which she was divorced: or dwell-
 ing and resorting in company with him at Bed, and Board, can-
 dispose her lands, or set racks thereof, in prejudice of the
 Heirs, who would otherways have succeeded to her.
 From which statute it is observable, that since the woman is
 incapacitated to dispose in this case; that therefore a man
 divorced for Adultery, may lawfully dispose his
 lands, in favours of the Children Procreat in that Adultery,
 the prohibition being restricted to the woman because of the
 facility of her sex, who may be tempted, or seduced, more
 than men can be: and yet since the presumption did on-
 ly run against the Adulterous Children, procreat in the se-
 cond marriage, whom it was probable the mother would have
 sired to the children of the first, and slighted husband. It
 is strange, why any deed done by her, in prejudice of nor
 those children, but even of any of her Heirs: would be
 void, though done in favours, of neither the Adulterous Hus-
 band, nor his Children; but even in favours of meer stran-
 gers.

gers, whom the Law needed not have suspected. But it was certainly done to prevent the mothers fraudulent connivances, who might have transmitted the estate to the adulterous Husband, or his posterity or friends under borrowed names, the discovering of such contrivances being very difficult, and the hazard of not discovering being very great, conceive likeways for the same reason, that the granting of personal Bond upon which the estate was thereafter comprised from the mother may be quarrelled upon this statute. For the Law might be easily cheated: and the statute it self declares all deeds done to the prejudice of the saids Heirs directly, or indirectly to be null, and yet since the mother remains still fiar, notwithstanding of this prohibition; I see not why a Bond, and comprising led thereon for debts truly owing to the Mother, could be quarrelled, where nothing was fraudulently designed against this act. And though this act be conceived in favours of the Heirs of the prior Marriage, and womans Heirs whatsoever: yet I see no reason, why this would not militat in favours of the King, to reduce deeds done to his prejudice as *ultimus haeres*, since a last Heire in the construction of Law is a true Heire.

 TITL

TITLE. XVIII.

Bigamie.

What is Bigamie by our Law, and how punished.

Why Bigamie was not punished as Adultery.

Whether Quakers may be punished for Bigamie.

Whether long absence may excuse in this Crime.

Whether the marriage sine concubitu infers Bigamie.

Whether a woman divorced for Adultery, marrying again, be guilty of Bigamie.

THat a man might marry two wives, was allowed by many Nations, and *Tacitus* observed, that only the *Germans* amongst all the Nations were content with one; but no Nation allowed, that a wife should marry two husbands, which was done, either because men were the only Legislators, and so were kind to themselves, in allowing themselves that liberty they denied to poor women, or else this was not allowed, because a womans marrying two men prejudged the peopling the common-wealth; Whereas a mans marrying moe wives, was advantageous for it. And the Law sayes, that more chastity is required in women then in men, and men being by nature hotter then they; *Bigamie* is therefore more unnatural in women.

I. Yet in our Law, either a man marrying two wives, or a woman marrying two husbands, commits Bigamy; and this is accounted by the 19. *Act 5. Par. Q. Mary*, a breach of the Oath made at marriage, and therefore is punishable as Perjury, by confiscation of all their Moveables, warding of their persons for year and day, and longer during the Queens will, and as infamous persons, never to bruike Office, Honour, Dignity, or Benefice in time coming.

II. It may be here doubted, why Bigamie was not punished as Adultery, seeing it may be notour Adultery, and is ordinarily so: to which difficulty, I think the answers are, that it was contraverted amongst Lawyers, whether Bigamie was punishable as Adultery, or as *Stuprum*, or *Fornicatio*; that it was not Adultery, they contended, because God allowed Bigamie, but he never allowed Adultery. 2. Many Nations allowed Bigamie, who condemned Adultery: and *l. 2. C. de incest. nupt.* where it is said, that *uomini licet duas uxores ducere*, the punishment of Adultery is not subjoyned, but it is only said, that *præses provincia hoc inultum non patitur*, and it may be added, that their marrying shows some more respect to the Law then Adultery, & *obfiguram matrimonii multa non adeo puniuntur.* 3. When Bigamie was by this Act declared punishable, only as Perjury and not by death, even incorrigible and manifest adulterers were only punishable by confiscation of their Moveables, is clear as by the subsequent Act, and the Act against notour adulterers to be punished by death, was not made till the 9th. *Parl. Q. Mary*. I know, that *Menoch. de arb. cas. 420.* thinks that Bigamie should be punished as Adultery. And I do think, that if the marriage be contracted, upon design to palliate the Adultery, it should be punished more severely then Adultery; and though the offender cannot be punished with death, as a bigamist, yet he may be punished with death as a notour adul-

adulterer. The same may be likewise said, if the persons marry against express Prohibition of the Church, or it may be of friends, for thereby they are put in *peissima fide*, and want the advantages arising, *figura matrimonii*: and this Statute punisheth only simple Bigamie, which was, possibly contracted, when the wife belived the husband to be dead, or *è contra*, or when there was some other pretext for it, but excludes not a further punishment due from other circumstances, or complex Crimes. And it were absurd to think, that incestuous persons, being forbidden to marry, because of their contingency in blood, or affinity, should not be punishable for Incest.

III. It may be doubted, if Quakers can be punished as perjurers, seeing they give no Oath at marriage, and certainly they should; seeing marriage implies a Vow, though no implicit Oath be given.

IV. The husbands long absence may be a cause why the punishment may be mitigated, but takes not away the Crime, seeing death and not time dissolves marriage. And I remember of a Minister, who was deposed for marrying a mans wife, after he was sixteen years absent, and albeit the first husband came home, yet the second husband still retained the wife, which certainly was Adultery in him, after that knowledge, that she was another mans wife; seeing he wanted that pretext, for which Bigamie is not punishable as Adultery. From which likewise, that general conclusion may be drawn, that when the Bigamist knows that the other person is married, if he continues, he commits Adultery, and if he know that it is incestuous, he commits Incest.

V. It may be doubted also, if two persons marrying, be guilty of Adultery, *eo ipso*, that they marry, though because of any interveening accident, as death, they bed not, and being by the second marriage, they give contrary Oaths; certainly they are guilty of Perjury; for Perjury being the

medium peccati in this crime, and not *copulatio*, or *coitus*, as in Adultery, *reatus contrahitur per contraria vota*, and he who lyen with another mans wife immediatly after they come from Church, though before she hath bedded with her husband, does in our Law commit adultery, which shews that mariage is contracted with us *per epologium*, or *benedictionem ecclesia & ante coitum*. And if after coming from Church the persons are married, certainly they are by that also guilty of Bigamie, and from this principle also it may be inferred, that though the first marriage was null *per frigiditatem*, or *maleficiationem*, yet the other person who might have declared that marriage to have been null, marrying another, before the first marriage was declared to have been null, though it was null *ab initio*, will be guilty of Bigamie, because there are *contraria vota* in that case, and Because he was not lawfully Divorced; for as a person who might have got a first marriage declared null *ex capite adulterii*, marrying again would be punishable, so it should be here; And if it be urged that marriages are declared *in frigidis & maleficiatis* to have been null *ab initio*, and therefore there having been no mariage at first, the second was no Bigamie, and the first Oath not binding *ab initio*, for it was given upon the supposition that the other person was *habilis* to contract a marriage, that vow was null, and therefore there were no contrary vowes in this case. It may be answered, that the Law considers that first marriage as a sufficient marriage till it was declared null, and the other person who might have got the marriage declared null, would have been punished as an Adulterer if she had lyen with another, *ergo*, she may be likewise punished as a Bigamist.

VI. The Act adds, *except the person were lawfully divorced*. From which two questions may arise, 1. Seing the party guilty cannot marry. *v. g.* If a woman be divorced for Adultery she cannot marry. *Quaritur*, then if she marrying again, may be pursued as guilty of Bigamie, and it may be alledged that

is not Bigamie, seing the act sayes, that if persons not lawfully Divorced marry, they commit Bigamie, *ergo à contraria*, where the persons are lawfully Divorced, they commit not Bigamie, nor doth the Law speak any thing of the difference betwixt the nocent and innocent parties. 2. If a person be divorced, and thereafter he marry, albeit thereafter that Decreet of Divorce be reduced, certainly the other party who married the person divorced, are not punishable, except the Decreet were reduced upon his fault, but the first Decreet of Divorce being reduced upon his fault who obtained it, as if he had bribed the Witnesses or Judges, &c. *eo casu*, it may be alledged, that he knew that the first marriage was not lawfully dissolved, and so the second marriage was Bigamie, *quo ad him*, albeit upon the other hand it may be debated, that the first marriage being dissolved *authore pratore*, it was no marriage at the time the second marriage was contracted, and so not Bigamie, albeit the briber or forger may be punished for the crimes so committed.

TITLE

TITLE XIX.

Theft.

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1. *The definition of Theft.*
 2. *In what things can Theft be committed, and whether it can be committed, in commodato & societate.*
 3. *The Law of Burdein-sack, or Theft committed for necessity.*
 4. *Whether the taking things belonging to no man, be punishable as Theft.*
 5. *The division of Theft, in furtum manifestum & non manifestum.*
 6. *Whether Theft ought to be punished by death.*
 7. *The punishment of it by our Law.*
 8. *How three Consecutive Thefts ought to be punished, and how inferiour Judges proceed, in judging Theft.*
 9. *How the Justices proceed, in judging this Crime.*
 10. *How hareships, or abigeatus is punished.*
 11. *How Sacrilege is punished.*
 12. *Theft in landed men is Treason.*
 13. *How Theft is aggravated from frequency, time, place, and other circumstances.*
 14. *Several extenuations of Theft.*
 15. *Statutory Thefts, such as breakers of Yards, stealing Fishes out of Ponds, Bees, &c.*
 16. *Art and Part of Theft, how punished.*

Albeit at first, every thing was made common, so that then there could be no Theft, yet since by the common consent of all Nations, property is introduced, Theft was forbidden as an enemy to this property, and as destructive to that order and method, whereby God resolved to govern the World: and therefore the Basilicks observe, that this Crime is against the Law of Nature, *οτις αμαρτημα και τιμωρις κοινη ηνικαυται.*

I. Theft is defin'd by Lawyers, to be *fraudulosa contractatio lucri facienda gratia vel ipsius rei, vel etiam usus ejus possessionis ve, quod lege naturali prohibetur*, S. 1. *Inst de obl. ex del.* By the word Contractatio, they understand, not only the away taking of a thing, for Theft is committed, by concealing what was taken from another; but likewise the using a thing depositat, or impignorat to other ends and uses, then was agreed upon: therefore Theft may be described, to be a fraudulent away-taking, or using what belongs to another man, without the owners consent.

II. Theft is only committed in Moveables, and thence it is, that by the Law of *England*, the stealing Writs, which concern Lands, or Lead from a house, or Fruit with the Trees whereon they grow, is not punishable as Theft, seeing these things belong to Hererage. Nor is the taking away Dogs, Birds, or such things as serve for pleasure, accounted Theft, seeing it is not committed *oblucrum*, Bolton, cap. 20. and Theft is never committed without fraud. And albeit by the Civil Law, the keeping of a thing lent, longer then the time allowed, or imploying it for another use then that which it was first lent be Theft by the Civil Law, *just. de furt. item*, yet in our Law it is not, *l. 3. Reg. Maj. cap. 9. m. 5.* and the reason there given is, because the intromission, and possession there, flowed originally from the Master. And albeit it be a rule in the Civil Law, that *initium minus cujusq; actionis semper est attendendum*: yet the former

former

mer reason is not valid; because when a master gives Money to his own servant, if he employ it to any other use, then appointed by his master, as if he should drink that which was given him to pay his masters Merchants; or if he should sell his masters horse, with which he was sent to a friend, these misemployments would certainly inter punishment, though the possession flow'd originally from the Master. And I think that Theft, in the case of a misemployed lend; and the other cases above express, is more heinous then ordinary Thefts, seeing it is aggravated by the breach of Trust, or Friendship, and it can likewise be less guarded against: For what two reasons; Domestick Theft is still more heinously punished, then ordinary Theft; and servants committing Theft in the cases foresaid, are hanged in these Countreys, whereas a Civil Theft is not Capital. But I believe, the reason of the Law above cited, is, because we thought that this *furtum interpretativum*, deserved not to be accounted such with a Theft, where death is the punishment of Theft. Whereas, because in the Roman Law, Theft was less severely punished: it was therefore allowable, that it might be more extended; and I think that our Law is more just then the Civil Law. And even according to the Civil Law, it were unjust that the person to whom the thing was lent, should be guilty of Theft for using it longer then was prescribed by the lender, except the lender had expressly required it; for else by not requiring it, it seems that he hath tacitly consented to the farther use, *sicut in tacite locatione*: and yet it may be answered, that there is a difference betwixt *locatum* & *commodatum*, as in this, seeing *locatio contrahitur utriusque gratia & locantis, conductoris*, whereas *comodatum respicit tantum commodum modatarii*, and so he should religiously observe the conditions prescribed by the lender; but yet I am clear, that a person should borrow any thing, at first for an other use, than what he pretended, that *eo casu*, he is punishable.

I remember to have read of a Banquier of *Paris*, who was
 Bea'd, and then quartered, for having borrowed vast sums,
 upon design to break with it (which instance I have set down,
 for the Merchants of our times) and seing the lender is as much
 wronged, and the seeker of the loane shews as great fraud by
 this pretence, as in other theft: I see not why the punish-
 ment should not be the same. I find it observed by *Bolton*, cap.
 31. that though in *Glanvels* time (who is reputed to be author
 of *Regiam Maj.*) *à furto omni modo excusabatur qui initium*
habuerit suae detentionis per dominum illius rei, yet it is not so
 now, for if a Carrier take out a parcel of the things delivered
 to him, and sell it, he is guilty of Theft; but it is not Theft
 in the Carrier to give away, or embezzle the whole as he re-
 ceived them, because it was delivered him in the same kind,
Stomf. 25. But this last part seems absurd, for the offender
 designs equally to offend, and the propriator is equally inju-
 red in both cases. It is doubted by Lawyers, whether Theft
 can be committed by one of these who are in a society, or who
 have right to a commony of these things, which is the sub-
 ject matter of the commony. It is answered, that it can, if
 fraud be proved in either of these cases, *l. si socius ff. de furto*,
 and the reason is, because the using that which is common,
 or that as in which the Society is constitute; otherways then
 according to the rules, is in effect to imploy for ones own use,
 what belongs to another, which is Theft; and who doubts,
 one of these who is in a Society, as in Beer brewing, would
 steal away in the night, considerable quantities of Beer, out
 of the Society, but he might be punished for Theft,
οὐκ ἔστιν ἡ κλοπή τοῦ κοινῶν πραγμᾶτος ὑποκείμενῃ τῇ περὶ κλοπῆς ἀρχῇ.
46. Basil. b. t.

I I. According to the Law of *Burden-sack*, or *Ibur anase-*
sa, no man can be accused for Theft, for as much meat as he
 can carry on his back, *R. M. l. 4. cap. 19.* But I think this
 should be restricted, by these two limitations; 1. If the

said Theft was committed, to satisfy his necessity, *l. verum ff. de furtis*, which is the meaning of that expression, necessity has no law. And 2. if he could not intertain himself another way. And whereas *Skeen* observes, upon the Word *Burden-sack*, the Thief should in this case, pay a Cow, or Sheep to him, in whose Land he was taken. I think that also unreasonable, seeing that presupposes, that the thief is not in that absolute necessity, which should get him this privilege: and whereas he observes, that he should be scourged, I think it most unreasonable, because his necessity, makes it in effect, to be no Theft: and it is contrair likewise, to the foresaid *16. cap. l. 4. Reg. Maj.* that no Court shall be holden upon *Burden-sack*. By the Civil Law likewise, *fraudantes fiscum*, or *gabellum*; the stealers of Customs were punishable as thieves, *Far. quest. 173.* but of this I shall treat hereafter.

IV. By the Civil Law it was accounted no Theft to intermeddle with, or abstract things that belonged to a succession, to which none had entered; because, before the entering of an Heir, these things could be called no mans, *l. Hereditarie ff. de furto*. And for the same reason, the taking away Rings, and other Goods from off a dead person, out of a Grave, is not counted Theft by the Law of *England*, as it was found in the *Notinghames* case, anno 1617. where this was only found a misdemeanour, and the defender whipt: but this holds not now in our Practique, which is most reasonable, for this is in effect greater then ordinary Theft, because these things have none to guard them. And in our Law likewise, he who finds a waite Beast, which hath strayed from the owner, should cause cry it either in the Court of his Over-Lord, or in the Church, or else he may be pursued for Theft; and Theft is likewise punishable, albeit the person be not known, from whom the thing was stolen, *Alex. Concilio 23.* And yet

furto

furtum non fit nisi sit cui fiat, κλοπή γὰρ γίνεται μὴ οὗτος τε τὴν κλοπὴν υφίσταμεν. l. 43. S. 5. *basil. h. t.*

V. Theft was divided by the Civil Law, in *manifestum* & *non manifestum*; Manifest Theft, was when the Thief himself was deprehenped, in the very act, or if he was seen with it before he did arrive, at the place, to which he did design to carry it. Theft not manifest, was, when either the Thief was not taken, or seen with it: and this distinction hath in my opinion, given occasion to the difference in our Law, betwixt in-fang-Thief, and out-fang-Thief, which concerns only the Jurisdiction where the Thief is punished, but not the punishment it self, as shall be said hereafter; but there are several other vestiges of it in our Law, as *cap. 21. l. 4. Reg. Maj.* It is said, that he who is taken with nothing in his hand, may purge himself by 27 men, and three Thanes. and a Burgeſs being accused of manifest Theft, may purge himself by the Oath of twelve; the meaning whereof, is, that he shall give his own Oath he is innocent, and shall get so many men to swear, that they believe his innocence, and this manifest Theft, is called Theft with red hand, *Stat. Orcar.* by a Metaphor borrowed from Murder. But with us, Theft may be divided into common Theft (which is Theft so properly called, or Stouth-rite, which is violent Theft) and a complex of Theft and Robbery. And receipt of Theft, which distinction is hinted at, in all our Laws, but most especially 50. *Act. P. 11. Fa. 6.*

VI. As to the punishment of Theft, it is much contravenied amongst Lawyers, if the Law-givers can justly punish Theft with death, and though I will not dispute the power of Princes and States, yet I incline to think, that for simple Theft, a Thief should not dye. For first, we find by the Law of God, to which as the Scripture sayes, nothing should be added, or paired, Theft is not punishable by death, nor can this Law be

called only a judicial Law fitted for the Common-wealth of the Jews: for that it is a Moral Law, according to its statutory part, forbidding Theft, appears from its being insert amongst the commands, and why it should not be so, as to its Sanction, and punishment like Murder, Incest, and these other crimes, I cannot see a reason. 2. We see that some Thefts are capitally punished, as are the stealing things Sacred, *Josh. 7.* And Theft committed in the night; *Exod. 22. 2.* and stealers of men, *Deut. 21. 7.* by which it appears, that God Almighty intended not that single Theft should be punished by death. 3. There is no proportion betwixt the life of a man, and any money, for all that a man hath will he give for his life. 4. The life of the Malefactor is ordinarily taken, where the Crime cannot be repaired, as in Murder, Incest, &c. But in Theft it may, and the parties wronged, would in all probability, be far easier secured this way, seeing many will rather want their goods, nor have a mans life taken. Many Thieves would restore, if they thought restitution might be made with safety of their life; and the Law would easilier sustain the pursuers probation, if the event were only to reach goods; and not life. 5. It seems absurd, that single Adultery, which is the worst of Thefts (seeing the Husband thereby is robbed of his Estate, quiet good name, and Succession) should not be punishable by death; and yet Theft should be made capital, and that Theft and Murder which are not equal crimes, should have equal punishments. And altho it be objected, that *Laban, Gen. 24. 9.* did vow that these who had stolen his goods, should be punished by death: Yet the reason in that case will appear to be, because that the Theft there mentioned, was Sacrilege. And whereas *Dauids* Oath to *Nathan*, is, that he who had stolen his Neighbours Lamb, should die, is objected. It is answered, either that was spoken in passion, which the Text bears; or otherways that was suggested by a special providence to *Da-*

to the end he might be his own accuser. Nor do I deny but there was a kind of Communion of goods amongst the Jews, more then in other Nations, as appears by their Jubilee, by their not taking Pledges, nor annual rent, so that there was less reason to make Theft capital amongst them, then amongst us, and that according as crimes grow more frequent, the punishment may be augmented, but I deny that they should be so augmented, that suitable proportion should not be kept. And it is known from experience, that many men fear hanging, less then being constantly kept in Correction-houses, or in the places where they may be kept working, as they do in *Holland*, for the good of the Common-wealth.

VII. To descend then to our Law, the custom is, that the justices do sometimes hang even for very small faults, as *Thomas Neilson* for stealing a horse, 10 December 1661. *Watson* hanged for stealing 40. Sheep, though there was no probation against him, but his own confession, and though he had restored the things stolln. Sometimes by banishment, as *Richard Lander*, 6. Febr. 1639. and *Alexander Cumming*, and *John Taiter*, 25. Febr. 1639. Sometimes they are Drowned, as *Grissel Mathow*, for stealing a Coffer with Writs, 23. June 1599. Sometimes Scourged, as *JAMES Wilson*, 7. Feb. 1608. Sometimes they are hanged in Chains, if they be notorious Thieves, as *Patrick Roy Macgrigor*, May. 1668. &c. It is thought that *de jure* there is no Law in Scotland for Hanging a man for Theft, which is a great mistake, for *Leg. Burgorum. cap. 121*. It is said, if a Thief be taken with bread worth a Farthing, and from one Farthing to four, he should be Scourged: for four Farthings he should be put in the Joggs, and Banished; from four to eight he should loose an ear: and if that same Thief be hereafter taken with eight Pennies, he should be hanged; but if any Thief should be taken with 32. Pennies and an Farthing, he may be hanged. 2. By the 7. *Alt stat. Da. 2. 13. ch.* and *13. l. 4. Reg. Maj.* one defamed for Theft, who cannot find

find caution, should be hanged, & *cap. 16.* It is said that no man can be hanged for lesse then two Sheep: and by the Law likewayes of *Birthingseck*, a Thief should not dye for as much meat as he can carry upon his back: and *cap. 18.* a Thief being hanged and falling from the Gallows, is no more to be punished. All which implies clearly that Theft is of its own nature punishable by death. 3. By the 82. *act. 7. 6. P. 11.* Stealers of Pleugh Graith, or breakers of Milnes, are to be punished therefore, to the death, as Thieves. But because our practiques, is in this, a little arbitrary and uncertain, it will be fit to know that Theft in *Scotland*, is either pursued by accusation, which is at the instance of a private accuser, or by way of inditement, which is at the instance of the Procurator Fiskal. If the pursuite be intended, by way of Accusation, it may be judged by Barrons having power of Pitt, and Gallows, or as our Charters call, *fossa & furca*, or by Sheriffs: but if it be pursued by way of inditement, the Cognition thereof belongs to the Justice. *Reg. Maj. cap. 1. Num. 7.* But this distinction, is not well observed, for the Sheriffs do proceed to judge Thefts even by Citation, & though the Thief be not taken with the Fang, which is certainly an error, for all processses upon citation against a Thief, should belong to the justices,

VIII. In the procedor before these inferiour Courts, they do not condemn to death, except upon three Thefts, or that the person be taken with Fang, and he be likewise *fame fur*. As to the three Thefts, I find no expresse Law touching only, *stat. Da. 2. cap. 17.* where it is said, if a Thief be defamed at three Barrons Courts, and wants a Pledge, or Caution, then he may be hanged, or if he be defamed, and cited in two courts, or in one, and be of ill fame likewise, or as we say, then be publick bruits and open fame that he is a Thier, then he may be hanged. But simple fame is said there, not too sufficient to infer death, except that ill fame were found by a

size upon Oath. Yet this is now absolet, for same is in no
 case sufficient to interr death.

As to the three Thefts, I find the Civilians relate, that the
 third Theft, by the Statutory Law of most places, is capital, and
 seems to be grounded upon very good reasons, for he who is
 found committing the same crime, is presumed by the Law
 to designe to make it a trade, *Ang. ad l. 8. de vi publica*, where
 the committing of Theft twice, interrs this presumption.
 The Law of *Holland* provides, that a Thief shall be hanged for
 the third Theft, except it seem otherways just to the Judge
 because of his age, or any other pregnant reason: and ordinari-
 ly three small Thefts, are by *Mathews* said not to be construed
 such, according to the Law of *Holland*, as deserves death: the
 Civilians do upon supposition that the third Theft is Capital,
 conclude, that these three thefts should be distinct, even as to
 the time, and that he is to be punished with death for the
 third theft, though he had been formerly punished for both the
 other two, or though the former two had been remitted to
 him by the Prince: and albeit they use many distinctions for
 ascertaining whether a Thief should be hanged for the third theft,
 where the first two were not committed within his Territory
 Jurisdiction, and so could not be punished by him, yet since
 capital punishment is not interred by a statute against the third
 theft, but that the third Theft is only punishable with death,
 because the committer is presumed to be irreclaimable: there-
 fore I think, that where ever the Theft was committed, yet
 the third Theft, the thief should be hanged; for albeit
 there be no express statute for that with us, yet, seing *Gomesi-*
us *hassanens*, and other famous Lawyers, attested this to be
 the general custome of the world; I think it should be fol-
 lowed by our Sheriffs and inferiour Judges, who being deter-
 mined by that number, have some certain rule whereby they
 may be both limited, and warranded, which is much safer
 then

then that they should be allowed scop, to break out into the extremities of either cruelty, or cowardliness.

The Law of *England* divides Theft or Larceny, into petty Larceny, when the thing stoln, exceeds not twelve pence and its punishment extends not to death, and grand Larceny when it exceeds twelve pence, wherein the thief is punishable by death, except he be saved by the book: and if one steal to the value of six pence, at one time, and six pence at another time, then he is guilty of death; but if two steal to the value of eighteen pence joyntly, each is guilty.

Common bruit, and open fame, of being an ordinary thief is likewise a good ground of making theft punishable by death the thief being taken with the fang, & *hi fures famosi sive infamati de pluribus furtis*, are ordinarily hanged likewise, as is clear by *Clarus, Num 8. hoc tit. Menoch. arbitrariis Casu, 291*. And it is sufficient that witnesses depen of their credulity and that they are informed by others, our Law calls *de famati de latrocinio*; and if he cannot find caution, the Law appoints, that he should be proceeded against as if he were a proven thief; for *latro defamatus* & *latro probatus*, are *equipollent* in our Law; But I think these Laws too severe and they are not in use.

IX. As to the procedor of the Justices; it is because the power is more eminent, that they are allowed to be more arbitrary; but I think the distinction allowed by Civilians, will be very reasonable, which is that, *in furto simplici*, in simple theft, the pain of death should never be imposed, but in qualified theft, if the quality be such as agredges the crime very much; Which aggravations are either taken from the thing itself, that is stoln, as in our statutes, the stealers of Pleugh-graith, cutters and destroyers of Pleugh, and Pleugh-graith in the time of teiling; and cutters and destroyers of growing trees, or breakers of Milnes, or of leading corns, or fewel, to be punished to the death, as thieves. 82. *Aff. 11, P. 3*

and hochers and killers of Oxen, horses, and other cattel, are punishable by death, and confiscation of movables, as well as committers as receptors, *Aët. 110. p. Fa. 6.* and upon this Act were hanged, for killing *Drumlanerk's* sheep, 20. Feb. 1666. Albeit it would appear, that that Act is only to be extended to labouring cattel. *Nota*, this is a case wherein Theft may be committed, without carrying any thing away, for the doing of these wrongs, without carrying away the thing wronged, is constantly declared to be Theft, & *per constitutionem Frederici Secundi destat. §. agriculatores*, the stealing Pleugh graith, is punished, as a particular crime.

X. Herdships, likewise, which is, the driving away a great many Cattle, called by the Civilians, *crimen abigeatus*, is likewise by the Law of all Nations, and particularly by ours, punished with death, but though *lex prima dig. de abigeat*: say that *abigei ad gladium dentur*. Yet *Mathews* doth interpret, that not to be meant, *de ultimo supplicio*, but only *de ludo gladiatorio*, and with this agrees, *l. 2. το των απελατων εγκλημα ποινα*. But if they went with arms, they were punished with death, as the *Scolia* of the *Basilicks* observe. It may be usefully observed, that those who drive away Herdships, *cum gladio*, with arms, are punished by death, because they are rather Robbers than Thieves. 2. These who drive away great Cattle, are more to be punished, then these who drive away the lesser, *l. 1. ff. de abige*. 3. These are to be most severely punished, who live in a countrey, where that crime is most frequent; and therefore our *Highlanders* are most severely punished. 4. These that drive away cattle from the fields, are more to be punished, then these who drive out of the houses, because Cattle in the fields have no guard but the Law.

XI. The stealing likewise of a thing consecrated to God, aggravates so the Theft, as to make it punishable by death, and this was called Sacrilege by the Civil, and Cannon Laws,

and was distinguished into several degrees, as 1. If a thing Sacred was stoln out of a sacred place. 2. If a thing Sacred was stoln out of any place. 3. If a thing not Sacred was stoln out of a Sacred place. But this two last are not properly Sacriledge. With us there are no formal Consecrations used of Churches, Vestments, Cupps, &c. and so we have no such formal crime, as Sacriledge; nor have we any act against it. Yet I think, to steal any thing destinat to Gods service and even to steal any thing out of a Church, deserves to be punished with death. And this Theft is aggravated with us, not only from the nature of the thing stoln, but more from the place; and thus also Murder, or mutilation, committed within the Church or Church-yaird, is more severely punished than other Murders; and with us these who steal out of Churches are still hanged, or who steal what is dedicated to, or serves the Church, as Basons. &c.

XII. The next aggravation of Theft is from the person who commits it, and thus Theft, when committed by landed men, is punished with us as Treason; *Ast. 30. p. 11. f. 6.* the words are, that if it shall happen any landed man to be lawfully and orderly convict of common Theft, receipt of theft, or Stouthreif he shall incur the crime and the pain of Treason. The reason inducive of this act was, because it was easier for landed men to commit theft, then for any others, and therefore it should be more severely punished; and these also wanted no pretext of necessity, or rusticity; and must be presumed to be extreemly mean and malicious persons, whom the Commonwealth might well want, and whom they should not suffer: but it may be here doubted who are these, who are by the act to be accounted landed men; And it would appear, That only such as have themselves, or their Predecessors, been Infeft, are only such, for, *nulla sasina nulla terra*, and so a disposition or charter or a resignation *in favorem*, makes not a thing to fall under the compasse of this Act. Yet some think an Heir served and retoured, doth fall within this signification, though

he be not Infeft, becaufe his lying out is his own fault, and fo
 ſhould not defend him. 2. I think that a perſon who was
 once a Barron, if he be thereafter denuded, falls not under it,
 or albeit *ſemel baro* is *ſemper baro* in our Law. Yet that max-
 im holds only presumptive; and if it be proved that he was
 actually denuded, that will liberat him from vicious intromiffi-
 on, much more a crime that deserves forfaulter and statutory
 times, are not to be extended. By ordinary theft in this act
 meant, theft without any aggravation of violence, herſhips,
 &c. by ſtouthreit is meant violent and maſterful theft. And
 this kind of theft hath the diſadvantage of being treason,
 ſo it is juſt that it ſhould participat of all the advantages which
 are allowed to thoſe who are purſued, as traitors, (*& quem ſe-
 quuntur incommoda eum debent ſequi commoda*) and therefore
 no inferior Judge is Judge competent to a proceſs founded
 upon this ſpecies of theft, as was found in *July, 1668.* where
 a proceſs intended againſt a landed man, before the Sheriff of
Wigtown, was Advocat to the Juſtices upon this reaſon; albeit
 it was alledged that this act being conceived *in odium*, and for
 oppreſſing of theft, it was unreaſonable that it ſhould not be
 quarrellable before every Judge, for thereby many would be
 deterred from purſuits againſt landed men. And albeit the
 puniſhment was in this theft, greater then in others; yet the
 relevancy and probation was no more intricat here then in other
 caſes. 2. It was alledged that the purſuer reſtricted his Li-
 bel to ordinary theft, which the Juſtices found he could not do,
 becauſe the relevance, and probation would be, *eadem utrobi-
 que*; and albeit the pairry would reſtrict as ſaid is, yet the
 Kings Advocat might, at any time thereafter, found a Proceſs
 of forſaulter, and needed no more probation: as in the caſe of
John Wauch, though the Sheriff of *Selkirk* had only fyned the
 thief, yet the Lords ſuſtained a declarator of eſcheat upon that
 ſame verdict, whereby the thief was found by them guilty of
 theft; for the Lords thought that privat parties could by no

declaration nor deed of theirs, prejudice His *Majestie's* interest, so that from this ground, it may be debated, that when a landed man is pursued for theft, the pursuer cannot restrict his pursuite to a pursuite of common theft. As also, that the pursuer failzieing to prove, in this case commits Treason, because he who pursues any man for treason, if he be found calumnious, commits treason. It may be doubted also if the Council can mitigat the punishment here, seing they cannot remit Treason: Yet in thir Statutory Treasons the Council ordinarily mitigats or converts the punishment. Nor see I any reason, why it may not be alledged that theft in landed men, is not made treason by this Act, but is only declared punishable as treason, and Theft, that is not to be judged as treason, though it should be punished as such, for these two are different.

XIII. This crime of Theft becomes sometimes atrocious, and so should be punishable by death, because of the irreclaimableness of the offender, and triple theft is capital in inferior Courts, though the things stoll be very inconsiderable, because this shews a habit or double theft, if the thing stoll be of great moment. And by the first Statute, *Da. 2. §. 4.* A thief banished, being taken again in these Territories, from which he was banished, may be proceeded against with all severity, and the breaking of park Dove coats, &c. is punishable by death at the third time, *Act. 84. F. 6. P. 6.*

The way likewise whereby the Theft is committed, makes it oft deserve to be capital, as the stealing by false keys, or breaking houses, and inchantments, and if it be committed masterfully, (as we use to speak) which is called *Stouth-reif* with us, and *Roboria*, by the Doctors then it deserves to be capitally punished, but of this afterwards.

Theft is likewise aggravated from the time, as stealing in the night is punishable by death, if the thief defend himself, and be armed. *l. furem. ff. ad l. Corn. de ficiat*, but with us generally

rally a thief breaking houses in the night may be killed by the person invaded, *Act 22. Ch. 2. p. 1. sect. 1.* which may be extended also to such thieves as are preparing to break the house, or who have done it already, and to steal any thing in the time a house is burning, or when a Ship is wrackt, or in time of tumults, or general desolation, were highly punishable by the Civil Law, either *pana fustium cum relegatione vel in metallum.* And with us I think such thieves should dye, for both they add affliction to the afflicted, and so shew very much malice. As also the committing Theft is then very easy, and to these cases I may adde theft committed in time of Pestilence.

XIV. As theft is aggraved by these, so it is extenuated by other circumstances, as 1. In case of necessity, as said is, 2. A wife stealing from her own husband, is not so severely to be punished as in other cases, for in effect she hath some interest, and therefore by the Common Law this was not punishable as theft, *sed actione rerum amotarum. l. qui servo. §. item placuit. ff. de furt.* but with us, the Kings Advocat may pursue either wife or husband stealing from one another, though the parties cannot. For it is to be presumed that there is too much malice in such pursutes, and that the pursuer designs in that case rather to be free from the marriage, then to have the Crime punished. 3. He who steals from his debtor, who will not pay him, or steals what was robbed from him, is punishable, but not by death, *Clar. num. 20. de furt.* 4. He who steals a thing of small value, *de minimis non curat lex*, of which formerly. 5. If the party from whom the thing was stoln, declare that it was not away-taken without his consent; some Lawyers think the crime is thereby purged: Which opinion others allow not except it be also proven, that there were presumptions of a prior consent, as the stealers good fame, his friendship to the party accused, the relation by affinity, or consanguinity, &c. but with us if the infor-

informer swear not the Libel, and depon that the thing was stoln, for ought he knows, the Libel will not be sustained. 6. If the taker had probable reasons, to presume the things taken by him to be his own, then he is excused from Criminal punishment, *προς την χρηματικὴν παραπεμπτα ζήτησιν, ad civilem questionem transmittitur, l. 1. §. ult. περι απλατων.*

X V. There are with us other statutory thefts, which are not so of their own nature, but are to be punished as such, as the breaking of Milnes, &c. *Act. 82. p. 11. §. 6.* A Salter, or Coalyer also, leaving his master without a sufficient Testimonial, or at least a sufficient reason given for his removal, and attested by the Bailie, or Magistrat of the place, are to be repute and punished as thieves, *Act. 11. p. 18. §. 6.* but it would appear that such only as receive fee and wages from others, are only punishable as such, but not otherwayes; and really it were unreasonable, that a poor Coalyer or Saltermight not leave that trade, either to take another trade, or for sickness, or any other cause, and that act seems only to hinder their going from one master to another.

Stealers of Pyks out of stanks, breakers of Dove-coats, Orchards or Yards, stealers and destroyers of Hives, are punishable as thieves, and this is ordained to be a point of dittay, and the unlaw to be ten Pound, and mends to the party, conform to the skaith, *Act. 69. P. 6. §. 4.* but by the 33. *Act. 2. P. §. 1.* stealing of green wood by night, or peilers of barks of trees, should pay fourty shillings to the King, and aslyth the Party, *Act. 33. 2. P. §. 1.* But thereafter by the 12 *Act. 4. P. §. 5.* the breaking of Dove-coats, Coney-gairs, Parks, or stanks (*i. e.*) Ponds, is declared to be punished as theft; but seing that appoints not that it shall be theft, it may be doubted if it should be repute as theft, as to the other disadvantages.

I find that upon the 25. of July, 1623. two fellows called Raith and Deane, are ordained to be hanged for breaking of Yards, stealing of Bee-skeps, and stealing of Sybows. By the

84. *Act, 6. P. F. 6.* the destroyers of Planting, haining-broom, pollicie, are for the first appointed to pay to the owner the avall, and ten pound for the second; the avall and twenty pound for the third, the avall and forty pound, and if they be not responſal, to be put in Priſon, and in the Irons for eight dayes, for the ſecond, fifteen dayes, for the third a Moneth, and to be ſcourged at the end of the Moneth. By which *Act* likewise, the breakers of Dove-coats, Conyngairs, and Parks, are to be puniſhed the ſame way, if they be not reſponſal, they are to be hanged for the third fault. It is observable, that though theſe perſons abovenamed were hanged for breaking of Yards, yet there is no warrant, therefore by that *Act*, though there be for breaking of Dove-coats and Parks, and ſo we may perceive, that the former *act* is not abrogated by this *Act*: And this *Act* declares, that the puniſhment here preſcribed ſhall be without prejudice to call the defenders at Juſtice Courts, and all the innovation introduced by this *act*, is that the offender may be tryed in theſe caſes, by the Barron, or Lands-lord, within whole Lands the wrong was committed, if the offender be taken reid hand, (whereas Land-lords are not Judges competent) and by the Sheriff, if they be not taken reid hand. 2. There is allowed by this *Act*, a power to Land-lords, to Judge in the caſe of wrongs done to their own Tennants, which *regulariter* was not lawful. It is likewise observable, that this and the 12 *Act, F. 5. p. 4.* adds ſtill without the good will of the owner. So that I think, that albeit the owners declaration be not ſufficient to abſolve the thief in other caſes, yet I think it is in this caſe, and that for theſe two reaſons, becauſe this ſtatutory theft, is only introduced in favours of the owners, and this Clause had elſe been unneceſſary. 2. It is preſumable that the owner would not reſuſe his conſent to kill a Deer or Coney, and this we may obſerve, that the words *inuito domino*, in the definition of theft, are not abſolutely unneceſſary, as many Lawyers carpingly obſerve, and that in ſome caſes, the conſent

sent of the owner may defend the Party. 3. It may be observed from this Act, that theft should be proved by confession or witnesses, and though other crimes may be proved by presumptions, yet this should not, seeing death is so exorbitant a punishment. 4. It is observable, that the Sheriff-depute, or other Deputes, may sit in cases belonging to the Sheriff himself, and that the Declinator which is sufficient against the one, excludes not the other. To take Doves also, which belongs to their Dove-coats, or to kill them, is repute theft, *l. Pomponius. S. Pomponius ff. fam. erisc.* and by the Doctors, *Chass. fol. 1484.* for seeing these creatures are ordinarily tame now, and that by the custome especially of the low Countries there are few or no wild Doves, it follows that it should be unlawful to kill or shoot them, as it is to shoot or hunt other wild beasts. The stealing likewise of Bees, which are kept in hives, was accounted theft, *l. Pomponius. S. Pomponius. ff. fam. erisc.* and by the Law of Germanie, *Berlich. conclus. 50.* For which though an arbitrary punishment should be regularly inflicted, yet if the Bees stoln be of great value, or if the committer has been frequently deprehended in the like guilt, then the Doctors are of opinion, that even stealing of Bees may be punished by death, *Fac. de Bellowis. pract. crim. Cap. 20. num. 32.* but I think our Law juster, which considers more the habit of the offender, then the greatnesse of the offence. Stealers likewise of Pyks out of stanks, was forbidden, but not punished by the Civil Law, but by the custom of all Nations, it is now punished arbitrarily according to the differing circumstances. *Berlich. conclus. 51.*

XVI. Art and part depends in this, as in other crimes, upon circumstances, but the ordinary rules prescribed by *Farinacius quest. 168.* are, 1. That he who gives counsel, or persuades to steal, is punishable as the Thief. 2. He who assists, especially if he partake of the Theft, is guilty, though he be not actually present, 3. He who recepts the thing stoln

by the Civil Law, *conatus*, or a deligne and essay to steal, if no theft was committed, was not punishable as Theft, *l. vulgaris ff. de furt.* where it is said, that he who entred another mans Closet upon deligne to steal, if he touched nothing, is only punishable *actione injuriarum si sine vi, vel de vi si, vi intravit.* And with us, I think that essaying to steal, should not be punished with death, seing the essayer might have repented, and seing *furtum est contréctatio rei aliena*, so before he touch any thing, I think he cannot be called, nor conscionably punished as a Thief. He who shews the way to a Thief is not a Thief, *οδους τω φουροντι της οδου κεισι κλοπης.* But with us this might be esteemed art and part by that Law likewise, if one broke the gate upon revenge, and another entered and stole, the breaker of the gate would not be lyable for Theft, *τα γαρ αμαρτηματα απο των διαθεσιων τε διακρίνεται. l. 53. Basil. h. t.* and yet I think, that he who brake the gate would be lyable for the price of the things so stolon, because he occasioned by unlawfull means the things to be stolon. Law has determined generally, that *ut furtum nemo facit sine dolo malo ita nec opem, & consilium fert sine dolo malo, & is consilium dat qui furtum persuadet, & is opem fert qui ministerium furto prabet,* συμβουλευει μὲν ὁ τὴν κλοπὴν υποτιθεμιν, & σπεύδει δὲ ὁ υποκρίσιν, τινὰ βουθυαν. ἐπὶ τῇ κλοπῇ παρερχόμενος.

And I conceive that there is in Law and reason, a great difference to be put betwixt these crimes, which are only committed against our fortunes, and in cases which may be repaired; wherein actual loss should be more considered then attempts, and these which are irreparable, when committed, and are atrocious, and concern the safety of our persons, wherein attempts should be highly punished.

If he whose goods are stolon, does require the master of the Thief, or him in whose obeisance he is, or with whom he is found, to deliver him up to him, that Justice may be done

TITLE XX.

Theft-boot and Receipt.

1. *What is Theft-boot, and by whom committed.*
2. *What is receipt of Theft.*
3. *How receipt of Theft is punished.*
4. *The principal Thief ought to be discusst before the Receptor.*
5. *How the husband is to be punished for what is found with the wife, &c & contra.*
6. *How Servants are punishable for the Masters theft.*
7. *How buyers of stolen goods are lyable.*

THeft-boot is committed by securing a Thief against the punishment due by Law, and properly it is when Sheriffs and other Judges who sell a Thief, or fyne with him in Theft-dome, committed, or to be committed, *P. 13. F. 6. A. 137.* and the Lord of regality, committing this crime, losses his Regalities and Barronies, *id est*, his Offices and Jurisdictions, as Lord of Regality, and as Barron, and the Justices and the Sheriffs loss life and goods. Theft-boot is also committed by any other person who takes a ranome from a Thief, when he finds him with the fang. 3. When a party who was leas'd, transacts with the Thief, and passing from the pursuite which is punishable, because the publick being by the crime wronged as

well as he, and his Majesty having *jus quasitum* to the moveables of the offender; it is unjust, that any private Party should have it in his power to indemnify the transgressor: and albeit thir two last species of Theft be not expressly contained in the Act, yet seeing the act bears, that Lords of regalities, Sheriffs, nor others, shall not sell, &c. under the word: others generally all transgressors are comprehended, and by the 2. Act 1. P. 7. 5. it is declared, that he who transacts with a Thief, for Theft committed against himself, shall be guilty of Theft-boot, and shall be punishable as the principal Thief, from which it appears, that the punishment of Theft-boot in private persons, is the same with the punishment of the thief, whereas in the first Act. P. 13. 7. 6. there is no punishment statuted against private persons who are guilty of Theft-boot, only against Judges transacting or ransoming, and *Skeen, verb. Bote*, defines Theft-boot to be when any person agrees with a Thief, or puts him from the Law. And yet I remember that in Jan. 1665. *Angus Mackintosh*, being pursued by the Sheriffe Depute of *Inverness*, for Theft-boot, as he who had composed with a Thief who had stolon some meal from him; the Lords of Session did Advocat this pursuite to themselves, because they thought this crime of Theft-boot in desuetude, and therefore they resolved to hear it themselves, that they might clearly determine what Theft-boot was, and how far it was to be extended.

II. The Civil Law knew not such distinct crime as receipt of Theft, but it was comprehended under the definition of Theft, for receipt is defined to be *occultatio latronum vel maleficorum ab eo qui latronem apprehendere poterat pecunias vel surreptorum parte accepta, l. 1. ff. de recept.* it is the wilful concealing or protecting a Thief by him who might have taken and apprehended him, and that either for money, or a part of the stoln goods, from which definition it may be inferred, 1. That such as lodge Thieves in Inns, are not lyable for receipt

cept, except it be likewise proved that they knew the person lodged to have stoll goods, which ignorance will not excuse, if it be affected and designed ignorance, as if all the neighbours knew, or if it was intimat to them, or if any person offered to inform, and the Inn-keeper would not know, or if the guest offered an extraordinary reward, or offered to bribe servants, or kept a very jealous watch, which presumptions may infer an arbitrary punishment, but not death. 2. It may be inferred that the lodging a kinsman, a wife or husbands entertaining one another, will not infer receipt, because that is presumed to be done rather, out of love, then *avarice* or *dole*, 1. 2. *f. de recept*, which was extended as *Chassan.* observes, *rubr.* 1. §. 5. N. 13. to a Mistris concealing her sweet-heart: In all which cases the receptors are only to be excused, if they communicate not in the Theft, for else they are to be punished as Thieves, for that is not the effect of love, but of fraud.

III. Receipt of theft with us, is punishable as the principal thief, *Stat. 21. Alex. 2.* Where it is said, that whosoever shall receipt the thing stoll willingly and knowingly, he shall be punished as the principal Thief, and from this it may be concluded, that receipt with us, is properly, when the thing stoll is received, and not when the stealer without the Theft is receipted; for to as the receipting of the Thief, it appears only to be punishable, when Letters of Intercommuning are published, prohibiting all the Leidges to receipt or fortifie a malefactor, else Letters of Intercommuning were unnecessary; nor see I why the receptor of a Thief should be in a worse condition then the receptor of a Murderer; and our practice speaks still of receipt of Theft, not of Thieves, at least receipt of this nature falls not under this special crime, but only under the Thief's general crime of receipting malefactors, but if the receptor of a take money, or good deed, for the receipting even his person, *casu*, he is guilty of Theft-boot, but by the 21. *Act P. 1. f. 6.*

It:

It is declared, that whosoever intercommuns with Thieves, or assists them in their theftous stealings, or deeds, either in going, or coming, or gives them meat, harbour, or assistance, or tryts with them any manner of way, they shall be pursued, either Civilly, or Criminally; but this act strikes not against such as have entertained the Thief any considerable time, after the committing of the Theft, and before Letters of Intercommuning were execute.

IV. The receptor with us cannot be punished, or thole an Affize, till the principal thief be first convict; for if he be assolized, the receptor cannot be punished, *Stat. David 2. cap. 29.* but by the *83. cap. quon. attach.* it was only declared that the receptor should not be punished till the principal was either convict or attained, *i. e.* accused with us. Now it is inviolably observed, that the principal thief should be first discussed, as was found and in *Anno 1663.* a verdict against *George Grahame*, before the Justices, finding him guilty of fraudulent using of a Bond, was rescinded, because the principal thief was not first discussed: the case was this, *Achmuty*, granted a Bond to the *Lady Bairfoot*, for eight hundred Merks, she assigned it to *George*, but thereafter payed him another way, and retired the Assignment, and after this she put both Bond and Assignment in a Bonnet case; and *George* having come by the bond (as he pretended from *Mistress Billing*, Daughter to the Lady, who alledged she had got it from her Mother for debt) he sends it to *Ireland*, and recovers payment, whereupon he was pursued for fraudulent using, and receipt, and his discharge of the former assignment was produced, and the Bond was proven to have been in the Ladies custody. Whereupon he was convict by the Affize, but this verdict was rescinded with the Justices Interloquutor, because the Libel was not relevant, till Master and *Mistress Billings*, had been first discuss, and the verdict was unjust, because it was not proved that they saw *George Grahame* deliver

deliver back the Bond, and the general discharge might have been given; (*peneranda pecunias* and if such using as this might be termed Theft; all actions of exhibitions would be turned in pursuits for theft.

But it may be doubted, whether if the Principal Thief dye, the receptor may be punished, seeing after death the Principal theft cannot be enquired into, for though that priviledge be granted, *quo ad* the discussion, yet it infers no indemnity to the receptor; and we see, that where the benefite of discussion is granted to Heirs or Cautioners, he who hath the benefite may be pursued, if the party who would have been first discusst, be, *in solvendo*, and the reason of this maxim should hold, when the Principal Thief is alive, and not when he is dead, is, because it is presumable that the pursuer is malicious against the receptor, for else he would doubtlesse pursue the Malefactor who did the most immediat wrong to him, which it is probable the receptor knew not. It may be also doubted, if the Thief dwell in England, or in France, whether the pursuer must first discusse him.

V. If the thing stolo by the wife, be found with the husband, he is not to be punished, except he expressly promise to defend his wife, or warrand her; but if the thing stolo by the husband be found under the wifes keys, or under her care, she is punishable as a thief, *Stat. Wil. c. 19. & quon. attach. c. 12* but these Chapters are confused, and *de practica* both man and wife are lyable, if they were accessory to any others Thefts, but no otherwise.

Albeit the concealing of Theft be Criminal in others, yet it is not so in a wife, *ibid.* And yet the husbands authority is said not to be sufficient to defend her in atrocious crimes, though she be obliged, generally to obey him, *ibid.* From which it may be observed, first, That theft is accompted an atrocious crime, for that Chapter treats of Theft, albeit this be

be much-controverted amongst the Doctors, who after a long debate, whether Statutes ordering the procedor in atrocious crimes, generally should be extended to Theft, which they refer to the arbitration of the Judge, who is to Judge according to circumstances. And certainly, picking, or petty Theft, is not an atrocious crime, except where the Thief made a trade of it: amongst other instances of this, I shall only cite *Robert Lander*, who was only banished for theft and pickry, *anno 1638.* but theft joyned with violence and rapin, stouth-reif is atrocious.

2. It is observable from that text, that in crimes that are not atrocious, *per argumentum à contrario*, obedience to the husband, excuses the wife.

VI. It is statued, v. 9. that servants are obliedged to reveal their masters theft, else they are guilty. From which it may be debated, that a servant who left his masters service immediatly, though he was in company with him at the cōmitting of theft, is not punishable for his being in company, since he might have been brought upon the place without knowing his Masters design, and being there, durst not to have refused concurse upon such accompt. I saw some servants Assailzied by the Council from death, they having left their Masters service, as said is, though they revealed not the Theft, which they might have omitted, either through fear, or want of probation.

VII. Recept then is punished as Theft, which must be meant only of immediat recept, for the mediāt sellers of goods belonging to thieves or inobedient persons, who dare not come to Mercat themselves, are only punishable by banishment, and confiscation of their moveables, the half whereof is to belong to the King, and the other half to the Suiter. And from this act may be raised these two doubts, *scilicet*. If this act should strike against the receptors of any other goods, then these *Highland Thieves*, seeing the act speaks of thieves who cannot come themselves to *Lowland Mercats*, whereby the acts made against *Sornars of Clans*, cannot be put to execution, yet sure-

ly this Act strikes against all sellers of goods belonging to any thieves, seing the reason is the same, Theft being thereby promoted, and the statutory words run disjunctively against the Sellers of goods belonging to Thieves in general, & *ubi lex non distinguit nec nos*, or inobedient persons and Clanns. 2. It may be doubted, if this act should reach the sellers of goods belonging to any other Malefactors, seing the Rubrick speaks generally of sellers of goods belonging to Malefactors: And some think, that if any Malefactor be at the Horn, the sellers of his goods may be punished by this act.

Ff

TITLE

TITLE XXI.

Hame-sucken.

1. *What privilege the Romans gave to a mans own house.*
2. *What is Hame-sucken, and the several kinds thereof.*
3. *The punishment of this crime.*
4. *How Hame-sucken is punished, when it is only pursued by way of aggravation.*

BY how much the person offended lives securely, by so much all invasions made upon that security are the more severely punishable; and therefore, seeing a man expects more security, and is least guarded against violence, whilst he lives peaceable at home, the Law punishes more severely injuries done him there then elsewhere: and it is very presumable, that no person would enter anothers house, with a designe to offend him, or would offend him there upon any accompt, except he who had very much malice and prejudice against him: For by injuries committed against a person in his own house, not only the publick peace, but even the Lawes of hospitality are offended.

I. According to the Civil Law, no man could have been drawn out of his own house, nor could have been cited therein, *ff. l. 8. de injus vocando plerique putaverunt nullum de domo sua injus vocare licere & quia domus tutissimum cuique refugium receptaculum est eumque qui inde injus vocaret vim inferre videri.* But

I be

I believe the reason of this Law was, because *vocatio in iur*, was at that time used, not by a simple citation, as now, but *ob-vento collo*, and by dragging the defender to the Court. For else it is not imaginable how the citing a person at his house could infer violence, or ryot against the citer: but though this Law is now so farr antiquated by custom, that any person whatsoever, may be cited in his own house, and may be violently drawn forth thereof by Captions in Civil cases, and warands in Criminal: Yet so pungent is the reason insert in that Law, that *domus cuique tutissimum refugium atque receptaculum est*, which is likewise repeated, *l. 1. C. de pretor & honor, pretor*: That it being joyned with the former reasons above expressed, hath introduced that by the statutes of the greatest part of the world, *gravior estimatur injuria alicui facta in domo sua quam alibi & ideo ut plurimum duplicatur pana malificii commissi in domo offensi*, *Cabal. consil. criminal. casu 13*. Which is likewise consonant to the Civil Law, whereby of old, the entering another mans house, *invito domino*, was punishable as a crime, *l. Corn. de injuriis*, and thereafter was punishable, *actione injuriarum, l. 23. ff. de injur.*

I I. The invading a person in his own house, with us is called Hame-sucken, and is defined to be, when any person violently enters into another mans house without licence, or contrary to the Kings peace, or seeks him, or assaults him there, and comes from a Dutch word *Haime*, which signifies a house, and *Sucken*, which signifies to seek or pursue: Concerning which crime it is observable, That 1. It either may be pursued as a seperat crime, or as the aggravation of another crime; when it is pursued as a formal crime, the pursuer must Libel that he was invaded violently, or sought after in his own house: for if the offender did come in upon invitation, or accidentally, and thereafter upon an emergent offended or invaded the Master of the house, this is not properly Hame-sucken, seeing the offender did not invade or sease. 2. The wrong

must be done to a person in his own house, that is to say, where the pursuer was staying, lying or rising night and day, *Reg. Maj. l. 4. cap. 9. v. 1.* Upon which place *Skeen* observes, *et qui in suum fecit juxta domum hac lege punitur Bartol. in authent. de appell. §. ad hac.* And I find that *Clar. quest. 82.* determines that a Statute which doubles the pain of invasion, when the invasion is made in the house of a Judge, or Magistrat, takes place not only against invasions made in the house it self, but likewise made in the confines thereof; And *Albericus de statutis, l. 2. quest. 35.* extends to crimes forbidden in places, to crimes committed within the confines thereof, which though it be contradicted by *Vincen. de fran. decisione. 402.* Because rigid and special Laws are strictly to be interpret; yet I think, that if the invasion was made in any place that properly belonged to the house, such as the Porch, Court, Inner Court, or Office-houses, that invasion should be punished as Hame-sucken, because a man is said to be at home there, and expects as much security there (which is the reason inductive of the Law) as any other else. And thus the ordinary form of Libels with us bears, that the pursuer was invaded within his dwelling house, or precinct thereof. *Thomas Crumbie*, was hanged, and his movables escheat, for offering to strike my Lady *Traquair* with a drawn Sword in her Garden, 23. Feb. 1638. but if the place wherein the invasion was made, was no inclosure, and so adjoynd to the house, I think that though it was at the very doore of the house, that *Bart.* his oppinion of *juxta dominum*, does not hold: And thus a Gentle-man being pursued upon the 24. of July 1663, for Hame-sucken, in swa far as he came to *Alexander Provests* dwelling house, and there called him out, and forced him to yoak his Carts, and scourged him; The Justices would not sustain the Libel as Hame-sucken, because it was not committed in the pursuers house; though it was done at the house door, but sustained it as oppression: And yet I think that if it had been alledged

alleged in this case, that this invasion was Hame-sucken, because the person injured was called out of his own house by the offender, and so *quo ad him* must be repute as if he had been in it; The Justices would have sustained this to have been Hame-sucken, if it could have been proved that the wrong was done immediatly without any preveining provocation; for the Law would have presumed that the person was called out of designe to evite the quality of that crime, *nec debet fraus sua quem libet adjuvare*.

It is doubted if a mans Shop is to be accompted his house, to inferre this crime, and though it may be alleged, that the security is to be expected, as well in the one, as in the other; And that it is as much the publicks interest, that Shops be not entered, and persons disturbed therein, as houses, for thereby publick commerce is leised, as well as privat safety; yet upon the other hand it may be alleged, that by the foresaid c. 19. v. 1. That is only called a mans house, where he uses to rise and lye: And amongst the different opinion of Lawyers, I find this reconcealing distinction used, that if the Shop be adjoyne to the house, and be not repute a different house, that *eo casu*, invasions in the Shop inferr Hame-sucken, otherwayes not, *Cabal, ibid.* where he likewise cites *Saliset, Albericus*, and others, determining, that if a man have two houses, in one whereof he dwells not with his family, that his being invaded in that house makes it not Hame-sucken, which is most consonant to our own Law above-cited, which requires lying and rising; And thus I remember that in June 1669. *Thomas Sydeserf*, having pursued *Mungo Murray, &c.* for invading him in his Play-house, that invasion was not punished as Hame-sucken, but with imprisonment. *Nota*, the former Law against Hame-sucken takes place as well when the invasion is committed in a mans hyred house, as his own, if he and his family live there, *Skeen ibid. & Bartol. le. ad legem jul. de adulteriis*.

It may be likewayes doubted, whether the beating a man in his own Ship, can be punished as Hame-sucken, since a man has

has not his Family there, and so it cannot be called properly his *hame*. But yet, I believe it should be punished as such, since it is the ordinary place of a Sea-mans residence: And thus it hath been found with us, that a Skipper may prove an injury done to him in his own Ship, by his own Servants; though Servants cannot prove *regulariter* for their Master, except in the case of Hame-sucken.

It hath been likewise doubted, whether an injury done to an Inn-keeper, can be punished as Hame-sucken, when done to him by such as lodged in his own Inn? And though it was alledged, that this was a greater Crime, then if it had been done by a person who lodged not there, because that was a Hame-sucken against Hospitality: yet because an Inn is a publick House, and belongs as well to the Lodgers as to the Master. The Justices did only sustain this as a great Ryot, but not as Hame-sucken, in the case of *Meor of Penniglen, Anno 1675.*

III. The punishment of this crime is the same with the ravishing of women, *R. M. L. 4. cap. 9 and 10.* And therefore the Laws made against ravishing of women, are ordinarily libelled upon, there being no special punishment exprest in the Laws against Hame-sucken, should be pursued within a night after it is committed, which time is allowed for getting the advice of friends, *ibid.* And yet in the former case of the Lady *Traquairs*, it was sustained after two moneths time, and doubtlesse that short prescription is now absolet, and the reason of it has been, because it being punishable as ravishing of women, it hath borrowed from that crime, the necessity of being recently pursued. And I think, that though the foresaid short prescription be not allowed by present custome, yet the Judge should consider whether any considerable time hath interveined, for else, *per intervallum temporis videtur dissimulari sicut injuria dissimulatur.* Nor is it probable that the person offended would have sitten long with such a wrong, and since that

crime

crime which was not Capital of its own nature, does become such by the circumstance of the place, it is reasonable that the person accused should not lye long under the hazard, & *gravatus in uno levandus in alio*: This crime hath likewise this privilege, that it may be proved by the pursuers own servants, friends, or other witnesses, who are otherwise lyable to exception, which is introduced not only upon the accompt of necessity, but likewise *in odium* of the offender: Nor were it possible to prove crimes of that nature by others then are in the family.

IV. When Hame-sucken is pursued only as an aggravation, it is libelled that such a thing was done by way of Hame-sucken, and the punishment thereof is arbitrary, *eo casu*, and this is so old an aggravation of a crime, that *David, 2 Sam. chap. 4. vers. 11.* aggravats the death of *Ishboseth*, because they had slain him in his own house, and upon his own bed. The Libel in Hame-sucken runs thus, that albeit by the Municipal Law of this Kingdom, the committers of the crime of Hame-sucken, that is to say, who ever invades any of our peaceable Subjects and Liedges violently with weapons, within their own dwelling houses, or precinct thereof, contrair to our peace, shall incur and underly the pain and punishment of death, as our saids Laws and Acts of Parliament in themselves proports, Notwithstanding whereof, it is of verity, that upon last bypast, the forenamed persons above-complained upon, being bodden in fear of war, with Sword, and other weapons invasive, came under silence and cloud of night, about ten hours at even, to the said *A. B.* his dwelling house, where he was quiet and in a sober manner for the time, &c.

TITLE

TITLE XXII

Breaking of Prison.

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1. *The punishment of breaking of Prison by the Civil Law, and ours.*
 2. *How the going out of Prison, when broke by another, is punishable.*
 3. *Whether he is punishable; if he return.*
 4. *How an endeavour to break Prison is punishable.*
 5. *How the Master of the Prison is punished, if the Prisoner escape.*

PRisons are ordained to keep prisoners till they be tried, and therefore he who breaks them, does more then tacitly acknowledge the guilt, since it is to be presumed that if he were innocent, he would think himself obliged in honour, as well as interest, to wait till he were absolved judicially: and since Prisons are the greatest securities of the publick peace, therefore to break them is a kind of sacrilege: And as the Walls of our Cities are sacred, because they defend us against our enemies, so should Prisons, because they defend us against our wicked Countrey-men, who are the greatest enemies of the Common-wealth. His Majesties Advocat did also in the case of *Hiltoun*, well call breaking of Prison a publick Hame-sucken.

I. The breakier of Prison (whow the Civil Law, calls *effra-*

For *carceris*) was punished *puna capitali*, l. 1. ff. de *effractor*: But by that punishment was meant not death, for that were too severe, but *capitis diminutio est mors civilis*, and in effect he was arbitrarily punishable, except he were a Souldier: for Souldiers breaking Prison were punished by death, l. 13. ff. de *re milit*, because Souldiers having ordinarily more courage, require that they should be over-awed by greater punishments. And yet I know, the learned *Mathens* thinks, that *quislibet effractor carceris*, is punishable by death: But I think not his Arguments concluding, for though *Ulp*, l. 1. ff. de *effractor*, says that *supplicium est sumendum*, yet it follows not, that by *supplicium* is meant death, since all the glossators make *supplicium* a genus; and when Lawyers mean death by it, they say, *ultimum supplicium*. And though *Cicero* sayes, that *exilium non est supplicium sed perfugium & portus supplicii*, he speaks there as an Orator; and indeed as to these who deserv'd to die, banishment is a harbour and happiness. Nor does his other Argument brought from the above-written Law, concerning Souldiers, conclude, for Souldiers, as I observ'd, are more severely punishable then others, because of the hazard of the event, and strictness of Discipline, and because, as I observ'd, they fear less, and so ought to be more threatened then others; but what need was there to have made a special Law for Souldiers, if all breakers of Prison were punishable by death? And it is against the nature of Arbitrary Crimes (such as this is confessed to be) to be punishable by death: and the word *capite punire*, should alwayes be interpret in the meekest sense it can bear: Nor see I why the Law would have spoke so generally, if it had design'd that severity. By our Law breakers of Prison are punish'd by banishment, or syning, according to the nature of the offence, but there is no exprels Statute determining the punishment.

II. He who fled out of Prison, when it was broke by another, should in the judgement of *Fulius Clarus*, be punished

in the same way; as if he had been found guilty of the Crime itself, because he confesses the Crime, and flight is a presumed acknowledgment, *Far. quest. 21. num. 23.* but this seems to me too severe, for flight is a presumption; and it is unjust to condemn upon presumptions; and were it not absurd to condemn a man to die for a Crime of which he is found by the tryal of others to be innocent: And men may flee out of prison, rather because of the inconveniencies of restraint, then out from the conscience of guilt, *vid. Pegner. quest. 1. crim.* But if there had been no violence used, a person imprisoned for a Criminal Cause, may escape lawfully, *Perez. ad tit. C. de custod. reor.* because he may redeem lawfully his own blood from hazard. If the person incarcerated was incarcerated only for a civil debt, he going out of prison, was even in that case found punishable only by an arbitrary punishment, *July 3. 1673.* In the case of *Francis Irving of Hiltoun*, who was pursued for breaking the Prison of *Aberdene*, where the Libel was founded upon the common Law, and the Laws of Nations, and upon our Municipal Law and custome, without citing any particular Law: And supposing that he being incarcerated for a civil debt, he and others brake the Prison, at least escap'd, the Prison being broken, and therefore concluded an arbitrary punishment, and payment of the damage done to the Tolbuith. Against which Libel it was alledg'd, 1. That it was not relevant, since it condescended upon no Statute; nor had we any Statute or Practick making the going out of Prison, when it was broke by another, punishable, and when the imprisonment was only for a civil debt. Nor was this a Crime by the Civil Law, which punisheth only *effractores carcerum*, but not *eos qui evaserunt*: For *nigrum nunquam excedere debet rubram*, that is to say, nothing in the Title should exceed the Rubrick, and therefore the Inscription or Rubrick being *de effractoribus*, only such were criminal by that Title, as were *effractores*. And as *Perez.* observes, *num. 16. Si absit violentia potest reus auferere*

fugere à carcere quem apertum vidit: And the reason of punishing *effractores carcerum* does not militate here, since there is no prejudice done to the Prison, nor violence committed against Authority. And it is lawful, because natural to every man to recover his natural liberty; nor was it ever heard that a man running away from a Messenger, was punish'd as *effractor carceris*, and yet that is the same guilt with what is here pursued. 2. The Libel concluding art and part of the breaking of Prison, because he escap'd out of Prison, when broken, is most irrelevant, since the one may exist without the other; or one may escape and not break, and therefore the one cannot be necessarily illative of the other. 3. The paying damage cannot be concluded against one who only went out, since he who goes only out of Prison occasions no damage, and consequently ought to pay none. To which it was replied, that as to the first, it hath been the constant opinion of lawyers, that going out of Prison that is broken is a crime, since the Prisoner ought to have taken no advantage of another mans crime, but ought rather to have hindered the breaking of the Prison, and to have cryed and advertised the Keeper, whereas here the Prison was broke by a long and daily work, and yet no notice was given; likeas, *Skeen* in his Annotations upon the 1. Chap. Stat. David 2. observes, that *qui fracto carcere aufugerit capite punitur*, which is consonant to *ff. de re milit. l. 36. ff. de pan.* To the 2. it was replied, that the Prison being broke in the night time, the pursuer could not distinguish who broke it: And if it were necessary to prove breaking, it should be impossible to prove the crime; and since the Pannel might have stayed and have cleared his innocence, it was just that the Law should conclude him guilty; and except the Pannel could by way of exculpation edge that it was broke by another, and offer to prove by whom it was broke, he who goes out should be concluded to art and part. Upon which debate the Justices sustain'd the

Libel to infer an arbitrary punishment: But yet the Assize attainted the Pannel, though it was proved that he was in Prison, and that the Prison was broke, and that he came down upon a Rope, for they thought that since his breaking of Prison was not proved, he ought not to be concluded guilty, but here the verdict was contrair to the Interloquutor.

If the Prisoner was unjustly detained in Prison, *Clarus* thinks that he is not to be punish'd, though he break Prison, *quest. 21. num. 26*. But this opinion is most absurd, for he ought not to be Judge to the lawfulness of his own imprisonment, but ought to apply to the lawful Authority for redress. And *l. 13. ff. de custod. reor.* doth expressly determine, *en puniendis esse quamvis innocentes inveniantur ex eo crimine propter quod in carcerem impatti sunt*. As also, it is very clear, that *l. nihil interest, C. de captiv.* Upon which the Doctors found their opinion, is only to be understood of such as broke the enemies Prison.

III. He who fled, having broke Prison, is not thought punishable as a breaker of Prison, if he return, *Boer. decis. 219. Clar. num. 28*. But this also seems debateable, since no man can give himself a remission: And there being *jus questum* for so, by the guilt once committed, it cannot be taken off without some deed of the power offended; and we see that Murderers and others as punishable by death, though they put themselves in Prison, *liminuit non tollit crimen*.

IV. These who broke not Prison, but essayed to break are to be more meekly punished then these who broke Prison. *Clar. num. 27*. which is also observed in Scotland. Nor only these who break Prison, but these who assisted them, and the Keepers, by whose contrivance or negligence they escaped, are punishable, *l. 8. 10. & 12. ff. de cust. reor.*

V. If a Prisoner escape, the Master of the Prison is obliged to purge himself by Oath, that he escaped without his will or consent, *Stat. David 2. cap. 1. num. 6*. And by the

Breaking of Prison.

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chap. num. 2. Stat. Rob. 1. the Keeper of the Prison is to answer for the Malefactor, either in body or goods, which takes only place where the Keeper was negligent in his duty, for else he is not lyable, as was found the 23. of November, 1675. in the case of Captain Martine, who being imprisoned by the Lords of Session, for not finding Caution in a pursuit before the Admiral against him, for taking free Ships, he escaped in Womens Cloaths; and the Keepers being pursued, it was alledg'd for him, that Keepers were only *depositarii*, Prisoners being depositat in their hands, that they might thereby be refered to a publick tryal, & *depositarii tenentur tantum, de dolo, & lata culpa*. And Farinacius tells us, that it was so decided at Rome, where a person escaped thus in Womens Cloaths. To which, though it was answered, that Servants, getting a Fee, are lyable, *ad exactissimam diligentiam*, without which, privat diligence, and publick revenge, might easily be disappointed: Yet the Lords, upon tryal of the Keepers innocence and diligence, did assoilzie him. But I have seen that Sisters have assisted their Brothers, and Wives their Husbands, to escape, even for crimes, without being punished; and *per l. 2. ff. de recept.* the receptors of such near relations are conniv'd at, so gentle is the Law, and so much it both follows and pardons nature. Breaking Prison in the night, is a great aggravation of this Crime, *οι νυκτερινοι τοιχωρυχοι ποταμοι μεταλλιζονται οι δε ημερινοι, συννικωσι η προσηκουσας εις εργον μεταλλονται. l. ult. Basil. b. 1.*

TITLE

TITLE XXIII.

De Dardanariis,

OR,

Fore-stallers.

-
1. *What Fore-stallers are, and the several species of this Crime by the Civil Law.*
 2. *The difference betwixt Fore-stallers and Regraters.*
 3. *The first branch of this Crime, by our Law, is the buying up Corns to a dearth.*
 4. *The second is, the buying Corns coming to a Mercat.*
 5. *The third is, the advising others to commit these Crimes.*
 6. *The fourth is, the buying Commodities in a Mercat, upon design to sell the same again at any other Mercat within four Miles.*
 7. *The punishment of this Crime.*

MEN having gathered themselves into Societies, they did for their own conveniency and provision grant many privileges to Mercats and to such as frequented them, and that all persons might be the more equally provided, they did lay such restrictions both upon buyers and sellers, as they thought fit for that design. For albeit it be lawfull for every man to use his own as he thinks fit, and to sell his commodities where

and to whom he pleases, yet seeing common justice is to be preferred to private advantage, it was the interest of the Common-wealth, as upon that accompt, they will not suffer any man to abuse his own, to the detriment of the Common-wealth, (as is to be seen in these Laws which concerns interdictions) so much lesse will they allow men to wrong the Common-wealth for their own private gain. The great instance whereof is seen in this crime of Fore-stalling, or regrating.

I. Fore-stallers were by the Romans called *Dardanarii* à *Dardano*, (a Merchant who was famous for that crime) And by the Civil Law these were accompted *dardanarii* properly, who purloined up their own Corns, or bought up the Corns of others, with design to keep them to a dearth, but improperly these were likewise called *Dardanarii*, who did buy up any other commodity unlawfully upon that design, which kind of Merchants were more properly called *panto poli*, by the novel of *Valentinian*, which crime as it was punished *per legem juliam de anona*, so the punishment of it *per L. sextam, ff. de extra. crim. est 20. anni & puniri extra ordinem*.

A third sort of *Dardanarii*, numbered amongst the Doctors, are these who properly are called *revenditores & qui emunt carius vendant ex raritate raritatis raritatem affectantis*. *Bolesanus cap. 135. num. 10.* Mathews also makes monopolists one branch of these, and surely they are equally guilty of prejudging the Common-wealth with these above relait,

Though Fore-stallers and Regraters be ordinarily taken for one and the same, yet there is this difference betwixt them, that Regraters are only those who buy goods, that they may sell them again at a dearer rate: But Fore-stallers are such as buy goods before they come to an open Mercat, but seeing custom is the e words promiscuously, we shall divide Fore-stallers or Regraters into these several species or branches,

III. The first species or kind of Fore-stallers, is of such, who either privatly, or by entering into Societies, buy up all goods upon designe, that by making themselves Master of the commodity, they may exact such rates for them as they think fit. And this is very fitly made a crime, because it is absolutely destructive to the conveniency of the people. But because this (as all designs are) a latent act of the mind, and so is hard to be proved, where the Fore-stallers have not entered into a Society, therefore this guilt is *quo ad* this qualification and design inferred from presumptions, as if a person should offer to buy all the Salmond in *Scotland*, and deal with all persons who have any to sell, that they should not sell to any other. 2. If any of these universal buyers should give extraordinary prices, which is presumed he would not do but upon some design. 3. If he should boast that none else had that Commodity to sell, or such other words as might be ground for a Judge to infer the design; yet it may be doubted here, if the universal buying of any of these Commodities, in order to a forraign transportation, and where none of them are vended at home within the Countrey, can infer the Crime of Fore-stalling, seeing strangers are only prejudged by hightening the prices in that case. But seeing the Countrey would be likewise thereby prejudged by being absolutely deprived of that Commodity, certainly the guilt will be extended even in that case, which will hold likewise in strangers, who buy up the Commodities of the Countrey upon that design, who may be likewise therefore punished within the Countrey where they commit the guilt being lyable to that Jurisdiction, *ratione loci delicti*.

IV. The second kind of Fore-stallers is of these who buy any Goods coming to Mercats, before they come to the public stall or place where they should be vended, and this is the reason of the denomination: And the reason why this is made a Crime, is, because Mercats being institute for the good of the Common-wealth, every thing by consequence behaveth

to be discharged, which is absolutely destructive to it; and the buying any thing before it come to the Mercat, is such. But it may be doubted here, whether Commodities may not be bought by Merchants in publick Burgh, though they be going to the Mercat of another publick Burgh? As for instance, if a Merchant in *Burntisland* may not buy Skins there from one who sayes he is carrying them to the Mercat of *Kinghorn*: And if this were not allowed, it would occasion much trouble both to sellers and buyers. 2. It may be upon the same ground doubted, if one may sell, finding that he is not able to stay to a Mercat day, which it may be, will be but once in a week in some places. As to which difficulty, my opinion is, that these can only be accounted Fore-stallers, against whom something of design against the common good can be proved: As if the Burgeses of one Town should be proved to have entered into a Contract to buy up the Commodities which were going to another adjacent Town, or should stand in the way every Mercat day upon design to buy up the Commodities that were going to the next adjacent Town. And I know this to have been the opinion of some learned Lawyers, in a case betwixt the New and Old Towns of *Aberdene*; but to make, that the buying of things generally before they come to a Mercat, should inter a Crime, were most hard and inconvenient. And because the design is the great thing to be look'd to, *non effectus sed affectus*, therefore both the Act of Parliament and Criminal dittay in this case, speak only of Fore-stalling and Regrating; for by the doing any thing of this nature commonly and frequently, *animus delinquendi*, is most probably inferred. And by the same reason, I conclude it probable alwayes for the defenders in this case to alledge by way of exculpation, that what they did, was done either ignorantly, or necessarily, or generally, *alio animo quam delinquendi*, v. g. If one in *Burntisland* were pannel'd for buying Skins that were coming to the Mercat of *Edinburgh*, he might alledge, that being

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obliged under a failzie to deliver such a number of Skins be-
twixt and such a day, that thetefore he was necessitate to buy
these: Or if any were alledged to have bought Stockings that
were coming for a Mercat, he might alledge that he bought
them for his own use, or that he knew not there was a Mercat
upon the place. And I conclude generally, that the buying
any thing for our own privat use, makes not the buyer in no
case culpable of this Crime, since he does that *tanquam qui li-*
bet & non tanquam Mercator, and Fore-stalling is a Crime in
Merchandizing.

V. The third degree of it is, the advising these who are to
sell, to hight the price, or the dissuading the sellers to come
to any particular Mercat.

VI. The fourth is, the buying Commodities in a Mercat,
of design to sell the same again in the same Mercat, or in any
other Mercat within four Miles thereof.

VII. All which species are expressly enumerat, *Cap. 20.*
Parl. 4. K. Ja. 5. By which the punishment is appointed to
be imprisoning of their persons, and the Escheating of their
goods bought and sold, the two part thereof belongs to the
King, and the third to the Sherriffs, or other Judge by whom
they are condemned. From which Act it may be concluded,
that any Judges are competent to punish Fore-stalling: albeit of
old, the Chamberlain was, in his chamberlain-air, the proper
Judge of Fore-stallers, as is clear by the Chap. 35. *st. K. Wil.*
vid. & cap. 78. leg. burg. And in the 143. *Act, Par. 12. K.*
J. 6. where the punishment is ordained to be 40. Pound for
the first fault, 100. Pound for the 2, And Escheat of all his
moveables for the third.

I find several persons convict of this crime, as Cairncrosse
and others, 9. June 1596. Anderson 12. June, Young and o-
thers, 11. of June, that Year; And Halyday, 6. August, 1596.
But I find no punishment to have followed in this, or any other
case: Though this crime cannot be said to be in desuetude,
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feing thre are some instances of it. Yet *mitius puniri debent*, Because these cases are so few, and no punishment has followed upon them.

I find it was alledged for *Young*, 11 June, And *Haliday*, 11. August, foresaid, that the Lybel was not relevant, not condescending upon the persons to whom the goods Fore-stalled were sold, nor the place, nor time, which was repelled, because Fore-stalling was unlawful in all places, and all times. But certainly this reply was not relevant, for else neither time, place, nor person needed be condescended on, seing these are still unlawful at all times. But I think the true reason why it should have been repelled, was, seing common Fore-stalling and Regrating was libelled, which is *nomen habitus*, and not founded upon any particular Act, and therefore the particular Acts needed not be libelled, though even in this case they must be expressly proved. But certainly, sometimes the time, and place is necessary, as where it is Libelled, that goods were bought, and presently sold, or within four Miles of the place where they were bought: for the crime in this case is inferred from the speciality of time and place.

It was alledged, that confiscation of Moveables could not be inferred, though for the third and fourth fault, except the Pannel had been convict for the first two: Which was repelled likewise, because the King could not be prejudged in his interest, *quo ad*, the confiscation by the negligence of his Advocate, or any privat informer, by not pursuing: Nor could that negligence purge their guilt, or procure them an impunity. And it were absurd, (seing crimes and punishments are to be commensurat) that these who had continued in that guilt for many years, should be no more punished, then these who had but once incurred the same.

TITLE XXIV.

Usury.

1. *In what Contracts Usury may be committed.*
2. *The taking of more annualrent then the quota stated by Law, is the first branch of Usury.*
3. *The second is, to take annualrents before the term of payment.*
4. *The third is, to take Wodsets in defraud of the Law.*
5. *Whether a Clause not to redeem for a long time, be Usury.*
6. *The probation of this Crime.*
7. *The punishment of it.*

USury is that Crime, which is committed by taking more annualrent for any sum lent, then what is allowed by the Law of the Kingdom.

I. This Crime is committed properly in Money, & is *mutuo*: but yet it is both by our Law, and the Civil, and Canon Laws, extended to other Contracts: for with us, it is committed in bargains of Victual, or Tacks, as shall be cleared by the subsequent Acts; and therefore Lawyers divide Usury, into that which they call *direct Usury*, *quæ obtinetur*

mutuum in mutuo; and *indirect Usury*, which takes place in other Contracts.

Usury is also divided, in *usuram manifestam & velatam*; which co-incides almost with the former distinction.

By our old Law, Usury could not have been pursued in the Usurers own life, but he might have repented him of it; at any time before his death; so that it was not the commission of the Crime, but the continuance in it, which was punishable: but if he repented not, his Heirs might be foregaulted. *l. 2. Reg. Maj. cap. 24.* And this, *Skeen* observes, to be consonant to the Law of *England*, whereby the penalty of a living Usurer, belongs to the King, but of a dead Usurer, to the Church.

II. The true method in this Title, is, to clear the several kinds of Usury, determined by our Statutes. The first Species thereof is,

Whoever receives more annualrent, then ten for each hundred, shall be punished as Ockerers, or Usurers, conform to the Laws of the Realm, already made, *Par. 11. K. Fa. 6. cap. 52.* And yet I find no prior Law to this, expressing the punishment of Usury; only it is said, *Par. 6. Fa. 2. Act 23.* that keepers of Victual to a dearth, shall be punished as Ockerers, and this is properly Usury.

By Act of Parliament, 1649. it is appointed, that the annualrent of Money, should be at six *per cent*, conform to which Act, all annualrents were payed in *Scotland*, till 1661. At which time the Parliament, 1649. was rescinded; whereupon it was debated, in *Hugh Roxburghs* case, *March 23. 1668.* whether the taking of more annualrent; then six *per cent*, after the year 1649. could infer usury; and that it could not, was urged from these reasons, 1. That where there was no Law, there could be no contempt: but so it was, that the Acts of Parliament 1649. were no Laws; that

that Parliament being rescinded, *ob defectum authoritatis*, and without any *salvo*, as to what was past. 2. The Liergers might as well be punished now for transgressing the penal Statutes, made by the usurpers, seeing these were binding, the time of the transgression, and both want authority equally. 3. By the Act betwixt Debitor and Creditor, 1. *Session 1. Parl. K. Ch.* 2. Such pactions are only declared usurious, *quo ad futura & inclusio unius est exclusio alterius*. To this it was answered, that the Parliament 1649. was in vigour till the year 1661. *Ergo*, before that time it was Usury, to take more then the annualrent therein prohibited; and albeit the defect of Authority might be pleaded, where the Crime committed, depended meerly upon the Authority contraverted. Yet in this case it could not; seeing Usury was a Crime, which was prohibited by all Laws. And as to the *quota*, which was all that was determined by the Parliament, 1649. It was no such thing as concerned the Rebellion, for which that Parliament was rescinded; but was a reasonable, and universal good for the Kingdom, and approved by the present Parliament. And those who took annualrent during that time, at more then six *per cent*, did in so far oppress the Debtors beyond others, and so should be punished. 2. By the Act anent penal Statutes, 1661. Usury is excepted from the penal Statutes therein abridged, which needed not, if the taking more then six *per cent*, for the years immediately preceeding, had not been Usury. 3. The Lords of Session did still restrict the annualrents, even during these years, to six *per cent*, which they could not have done, if that Law had not warranted them; as in the case betwixt *Wauchop and Lawder*, 1665. for if that Act was in force then, it was a Crime to take more then was therein commanded, if it was not abrogated; then the former Act, 1648. appointing eight *per cent*, was in vigour, and so the Lords could not restrict the annualrent to six, against an expresse Law. This case

case was not decided, but the Justices inclined to think, that though the Act 1649. was abrogated; yet it was a sufficient warrant, to regulate the Decision of civil cases, because all bargains were then made, with respect to the *quota*, thereby determined, & *erat lex habita & reputata*: but that being abrogated, it could not found sufficiently a criminal Action, to infer so severe a punishment, as that of Usury; for a Crime is mainly such, because Authority is contemned, and contempt is the essence of a Crime; but so it is, there could be no contempt where there was no Authority. But it may be doubted, if a Merchant who was to imploy his stock upon Merchandize, whereby he might have got far more then the annual rent of his stock, should at the desire of his friend, then in great straits, lend him his Money, for more then the ordinary profit; if in that case he could be punishable as an Usurer? And albeit our Law be general, yet here *ab est animus sanerandi*: and there was no advantage taken of the Debtors necessity; for which, Usury is mainly punishable. And I find, that *Abbas c. Naviganti de usur. num. 13. & Socin. tract de usur. num. 75.* do conclude this to be no Usury. Yet I know, that some judicious Lawyers with us, did at a consultation upon this same case, conclude, that the Justices could not receive this exception, seeing they were tyed to strict Law; but they thought that the Council might allow some mitigation.

III. Another *Species* of Usury by our Law, is, to take annual rent before hand; that is to say, before the term of payment, which was ordinarily done, by retaining a years annual rent, when the Money was first lent, and this is determined to be Usury, by the 22. *Act Parl. 14. K. 74. 6.* and thereafter by the 28. *Act Parl. 23. K. 74. 6.* by which last, it was likewise Statute, that whosoever shall detain the time of the lending, or shall exact, crave, or receive from the Debtors, annual rent at the time of the lending, or add the same

to their principal summes, or whosoever shall exact, or crave annualrent, shall commit Usury. And this seems to be founded upon that principal of the Civil Law, whereby *punitur qui plus petebant & plus tempore petere dicebatur qui petebant ante tempus debito constitutum.*

Upon these last words of the Act of Parliament, forbidding the exacting, or craving annualrents before the term of payment, there was a dittay founded against *Purdie*, in the year 1666. for taking ten pounds Scots, as the annualrents of fifty merks, upon the 18. of *July*, whereas no annualrents was due, till *Martimas* that year. Against which dittay, it was alledged, 1. That this Species of the dittay was meerly Statutory, and so was not to be extended, either beyond the interest of the Leidges, to salve which, it was intended, or beyond the expresse words of the Act; but so it is that it was only the interest of the Leidges, that they should not be forced to pay interest before hand; but that they might voluntarily pay their annualrents, without any danger to the receiver, which may sometimes be for the advantage of the payer; as for instance, if a person who were lyable for annualrents at *Martimas*, might be for his own advantage desirous that his Creditor might receive his annualrents in September, because he would not have the conveniency of paying them at *Martimas*, and might be either at expences, or in hazard to send them. And therefore, seeing the receiver here had raised no charge of Horning, nor used no other diligence for compelling the Debtors to pay the annualrents, his voluntary offer of them should not prejudice the receiver, especially seeing by the narrative of the Act, it will appear that the eviting of oppression, in exacting Money before the term was that against which the Act of Parliament intended only guard. 2. Though by the first part of the Act, exacting, or receiving annualrents at the time of the lending, is expressly forbidden: Yet when the craving annualrents before

the term of payment (which is the clause founded upon, in this dittay) the Act speaks only thereof, craving, or exacting, but doth not forbid simply receiving. 3. *Consuetudo etiam mala & injusta excusat usurarium à pena Bar. in lege quis fugitivus, ff. edil. edict. Socinus consilio 170.* And it was very notour, that in this case there was nothing more ordinar, then for honest and just men in Scotland, to take annualrent before the term, from willing Debtors, either to supplie their own necessity, or to gratify their Debitor upon occasions. And it were very unjust, that the Pannel who was a poor Merchant should ensnare himself, in *apicibus juris*, thinking himself warranted in what he did, by the practice of the countrey, and of the most intelligent persons therein. 4. *De minimis non curat prator*, nor should severe and statutory punishment be inflicted for errors, where no person is any way considerably prejudged. And in which, it cannot be presumed there was any guilt, seeing the advantage was so small, for the only share the Pannel reapt of this, was the annualrent of ten pound, from *July to Martimas*, which could not exceed three shilling scots; so that to conclude, an honest sincere Merchant, who was otherwise *intigerrima fama*, guilty of Usury; and to infer confiscation of all his Moveables, and Infamy, which is the punishment of Usury, is against all sense and reason, who are not (as the justices) tied to strict Law.

Notwithstanding of all which, the Justices did find the dittay relevant, as founded upon the above-written clause of the foresaid Act; but the grounds above related, being represented to the Council, they rescinded the Justices Interloquutor; and yet the Justice did again condemn *Hugh Roxburgh*, 28. of November, 1668. upon the same Act, and like dittay; but that Interloquutor was likewise stopt by the Council.

IV. The third Species of Statutory Usury with us, is committed by these, who to cheat the Law, colour their fraud

by taking, not more annualrent directly, then that is prescribed by the Law, but taking wodssets of Land from the borrower, for more then their annualrent can extend to, and set back-tacks to them for payment of what is agreed upon. To prevent which, and all such Usury (which is called by the Law, *usura velata*) it is statute by the 247. *Act Parl.* 15. K. J. 4. 6. that whoever receives such wodssets, or enters into any such bargains, for which more is taken, either in Money, or by any other transactions, whereby any thing that is taken, may be reduced in Money, to more then the ordinar annualrent, upon whatsoever colour or pretext, shall be guilty of Usury. And by the 62. *Act Parl.* 1. K. Ch. 2. It is declared, that for the future, it shall be Usury to receive proper wodssets of Lands, and others, exceeding the annualrents of the sums, and bearing by expresse provision, that the lender shall not be lyable to any hazards of the Fruits, Tennents, Warr, or Trouble; for clearing of which Act, it is necessary to know, that wodssets with us, are either proper, or improper; proper are these, wherein the wodsetter runs all hazard of the Lands wodset to him, and is to expect no more annualrent for his Money, then what Fruits of the Lands remains after all hazards. Improper wodssets are these, wherein the wodsetter is only countable for what rent he receives from the lender; nor is he lyable to the hazard of Bankrupt-tennents, Warr and Pestilence, which distinction, founded upon these hazards, is very agreeable to reason, and the common Law, for Usury being a certain gain, he who gets for his Money but a hazard of gain, commits not Usury, for that is *emptio iactus retis*, as if I should lend Money, and get for my security the hazard of what rent could be collected from a loading of Timber coming from Norway, &c. And upon this ground, the Law allowed *fenus nauticus*, to be much greater then all others, seeing the lender run the risk therein of all Sea hazards. But if the hazard be not so great as may compensate the

excess

excess of the annualrent taken beyond what the Law allows, *in casu*, it excuses not from Usury, as if a wodset be granted of a Miln, or Salmond fishing, if the said rents do ordinarily exceed the annualrents, by any considerable excess, then the receivers of the wodset commit Usury, notwithstanding of the hazard. And this brings to my memory, a case debated upon the 22. of *January*, 1672. wherein a Gentleman being pursued as an Usurer, in so far as he had taken his Debtor obliged to pay him a Boll, for the annualrent of every hundred Merk, which according to the feir of the year did, for the two years of his wodset, extended to five Pound the Boll, and so exceeded the annualrent, by twenty Shilling every Boll; yet this was found no Usury, because he in that case, took his hazard of the feir of the year, which might have been much lower: and because that the price of Victual varies much, according to the several Shires, and Years. And lest the people should be at an uncertainty in criminal cases, which were dangerous; therefore by the 122. *Act Ja. 6.* c. 14. it is appointed, that no man shall take more profite, then according to ten Pound, for the hundred Pound, or five Bolls of Victual, which the annualrent being then, at ten of the hundred, and now at six, doth allow according to that proportion two Bolls for the hundred Merks, whereas there is but only one Boll taken here, for the annualrent for the hundred Merk; nor was this Act abrogat by the Act 247. c. 15. because, though that be posterior, yet it doth not expressly abrogat this Act, nor ought it to have been abrogat for avoiding of uncertainty, as said is. And for the same reason, the undertaking of hazard hinders the taking of advantageous Tacks, to infer Usury, as was decided *September* 1668. wherein *Robert Lawder* was pursued as an Usurer, because he had taken a tack of two Buts of Land, and a Dovecoat for four years, which payed fifty Merks yearly, *communibus annis*, and

and that for satisfaction of the annuallrents of an hundred Merks, which Tack did bear this clause, that if the first year *Robert* were payed, he should defalck so much of the annuallrent proportionally; notwithstanding of which clause, he refused to compt: It was alledged for the defender, that the Tacks-man had run a hazard, because he might have been disappointed of all duty, *quo casu*, he would have got no releif. To which it was duplyed, that the same hazard was in wodsets; and yet the taking a wodset for more then the ordinary annuallrent, made the wodsetter incur the Crime of Usury. Nor could this hazard defend, because it was not great, and there was scarce any hazard in it; nor could the danger be here objected, seeing after expiring of the years, the receiver offered to compt with the lender, and to allow him both principal sum, and annuallrents; to which it was triplyed, that the Act of Parliament, discharging Usurary, wodsets doth not discharge Tacks; and there is a great difference, as to Usury betwixt tacks and wodsets: for wodsetters have the liberty to require their Money from the debtor, so that they lose not the sum, though they lose their rents; but Tackmen lose all, if their tack duty be not payed: and as to their offer of compting, that being only competent after the first year, it could not be objected thereafter, and the danger was past before the offer.

The fourth degree of usury with us, is to take budd or bribe for the loan of money, or for continuing it, when it is lent whereupon many debates do arise. The cause why the debtor gives a gratuity to his Creditor, being oft, *actus animi*, hard to be proven. But generally it is sustained that a preceding Treatie must be proved, or else it must be proved that the receiver is *manifestus*, that is an ordinar Usurer, or else to receive a gratuity is no crime; And it were against

son, that by lending money to my friend, I should become incapable of a donation from him.

V. The common Law also sustains it to be Usury, if a man Wodset his Lands, and in the Wodset provide that it shall not be lawful to Redeem betwixt and a definit time, for in that case it presumes that the wodset granter adjects this because of some known advantage, and this is to take more advantage for money then the Annualrent. *Molm. de Censu*. But this the Lords would not sustain to be Usury. Nor did they find it an unlawful paction, in the Action betwixt, Sir *Iohn Drummond*, and *Achtertyr*. And in effect these pactions are allowed by Act 62. P. 1. K. C. 1. S. 1.

By the Civil Law, it was Usury to take Annualrent for Annualrent; at least it was declared unlawful, *l. ult. C. de usur*. And I conceive that to swell up Annualrents thus, beyond what the Law allows, would infer Usury with us: for else the Law might be thus cheated. But though by the Civil Law it was unlawful, and Usury, to accumulate Annualrents with the principal sums; and to make both bear Annualrent; which was called *Anatocismus*, and is discharged, *l. 28. C. de usur*. yet with us, such pactions are most lawful: for since, if the Annuals had been payed, they had born Annuals, why may they not be lent out to the debtor, as well as to others.

VI. The probation of Usury is, either by writ, witnesses, or Oath, as to writ it may be doubted, how the pursuer may recover it for instructing his Libel, the writs being ordinarily in the Usurers own hand, and *nemo tenetur edere instrumenta contra se*. And yet I find Lawyers very clear, that *hoc casu tenetur edere contra se Bartol. & doctores ad l. prator §. Is etiam ff. de edendo Arelat. de heretic. notabil. 21.* and seeing with us, Usurers are obliged to swear against the common Criminal rules, because of the obscurity of the crime, why should they not be obliged to produce ther writs, for the same reason: and as to the former maxime, that *nemo tenetur edere, &c.* It may be

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VI. The probation of Usury is, either by writ, witnesses, or Oath, as to writ it may be doubted, how the pursuer may recover it for instructing his Libel, the writs being ordinarily in the Usurers own hand, and *nemo tenetur edere instrumenta contra se*. And yet I find Lawyers very clear, that *hoc casu tenetur edere contra se Bartol. & doctores ad l. prator §. Is etiam ff. de edendo Arelat. de heretic. notabil. 21.* and seing with us, Usurers are obligedged to swear against the common Criminal rules, because of the obscurity of the crime, why should they not be obligedged to produce ther writs, for the same reason: and as to the former maxime, that *nemo tenetur edere, &c.* It may be

be answered, that it holds not *in criminalibus*, for we see that in improbations, the Pursuer will force the Defender upon an alledgeance of falshood to produce all his writs, and why not in Usury? Yet I know that it is ordinarily advised in such cases to raise an exhibition.

As to the probation by witnesses, It is doubted if the Debitor who lent the money may be received as witness: seeing he is *socius criminis*, it being unlawful to take as well as to give upon Usury, but with us these are received, as *Hissleside* in *Somervell's* case, 18. Jan. 1667. But thereafter the Justices declared that they would not sustain the Debitor to be a witness 11. November, 1667. His Majesties Advocat contra *Wilson*, And that because by the 7. Act, P. 16. K. F. 6. It is appointed that usury shall be proved by the Oath of the party receiver of the unlawful Annualrent, and witnesses insert, without receiving the Oath of the giver of the unlawful Annualrent, for eviting perjury. Nor will the Justices sustain as a reply, that the giver of the unlawful Annualrent in this case had payed the sum, and so was no more debtor, and could expect no advantage, and so the fear of perjury ceased. And as to the foresaid seventh Act, It was answered, that it was only made not to exclude the debtor absolutely, but to correct the 257. Act, 15. P. K. F. 6. whereby the Oath of Party was declared to be receivable as decisive of the cause. As to other witnesses, our ordinary distinction is, that pactions in Usury are either extrinseck to the Bond, or writ, as are the taking Bud or Bribe for continuing a Sum, and these may be proved by any witnesses; albeit by the foresaid 7. Act. It is said that Usury shall be proved by the Oath of the Party, and witnesses insert. But pactions which concern the writ it self, as that whereby more is promised then is contained in the bond, these cannot be proven, but by the Witnesses insert, for else writ might be taken away by Witnesses. As to oath of Party, it

is ordained to be taken by the former acts against the common rules of Law, by which, *nemo tenetur jurare in suam turpitudinem*: And the Justices accordingly do force the Pannels to swear, as in the case of *Wilson* above cited. But it may be doubted if this act should not extend only to Civil, and not Criminal cases; For that act sayes, that *litis-contestation* being made, it shall be lawful to receive: But so it is that there is no *litis-contestation* in Criminals. go. This Act cannot be extended to these cases.

VII. Usury was allowed by the Civil Law, as the proper product, or *proventus pecunie*, but by the Canon Law it was punished, and most Lawyers think it may be punished criminally, *Decius Consil.* 130. And it is called *crimen utriusque fori*, because it is punishable Civilly and Ecclesiastically.

The pain of Usury with us, is, That the debtor shall be free from his obligation, or have back his pledge, or if the debtor conceal, then the revealer shall have right to the sums, *Aff.* 222. *K. F.* 6. *Par.* 14. And by the 248 *Aff.* P. 15. *K. F.* 6: It is appointed that the Usurary Bond or Contract shall be reduced, and being reduced; the sums shall belong to His Majesty, or his Donator; and the Party to have repetition of the unlawful Annualrent payed by him, in case only he concurs with the Donator in the reduction.

TITLE XXV.

The Bribing, Partiality, and Negligence of Judges.

1. *What is bribing by the Civil Law.*
2. *What by our Law, and how our Law punisheth it.*
3. *Crimen repetundarum & Barratriæ.*
4. *Whether Arbiters, Delegates, or Assessors, be punishable for taking Bribes.*
5. *How negligent Judges are punishable.*

IT is to no purpose to make good Laws, if the execution of them be not committed to just and diligent persons, and it is to no purpose to have an exact ballance, if that ballance be not put in a good hand: and therefore, as the Law hath been very liberal of its priviledges, to just Judges, and severe in punishing such as offended them; so it hath punish'd with the same rigour, such Judges as transgress either by bribing, negligence, or partiality, which are three distinct species forbidden by the common Law and ours.

I. Bribing is the taking of money, or other good deed, either for doing of justice, or committing of unjustice.

There are indeed some Lawyers who think, that a Judge taking money in a Civil Cause, to do justice, doth not thereby commit a Crime, but is only lyable to restitution, *Memo. 2. Arb. 342. n. 6.* but this is expressly contrary to sound reason, since if taking upon any terms be allowed, the Law ma

be eluded, and Judges will be thereby tempted, not only to take bribes, but to take pains to justify what they have done: but yet I think that this opinion is neither proved, *per l. 4. ff. de l. jul. repetund.* For there it is not only said, *non excipiet quo magis aut minus quid ex officio suofecerit*, which prohibits only an excess in justice, and not the doing justice for money, nor *per l. 3. c. eod.* since that Law doth only in the general forbid the taking of money, but this is expressly forbidden, *l. 2. §. 2 ff. de conduct. ob turp. caus.* where it is declared a Crime, but the punishment there seems only to be *litem suam facere*, and Sken ad Stat. 25. Wil. says, that *non licet judici vendere judicium justum.*

II. By our Law, the Kings Judges were to thole an Affize upon what they had done as Judges, and if they were convicted, they were to be punished by the King and his Council, according to the measure of their fault, *Cap. 13. Stat. Rob. 2.* and the Judges of inferior Courts, such as Regalities, were to thole an Affize before the Justices, and if they were found either culpable or remiss, they were to escheat their moveables, and their life to be in the Kings will, or in the will of the Lords of the Regality, *cap. 14. ibid.*

And by the 26. Act, §. 3. *Parl. 5.* a Sheriff, or any other Officer of Fee, that is to say, any Heritable Officer, is to be put from his Office for three years, if he be found partial, and an ordinary Judge, if he be found partial, loseth his Office for ever. And though his person's being punished at the King's will, and the paying of the expence of the party injured, be only added to the punishment, expressed against a Judge who is not Heritable; yet I conceive, that being added in the last place, it is applicable, both to the Heritable Judges, and others. Likeas, it is observable, that though by all these Acts, the King and His Council are only exprest to be the Judges competent; yet *de practica*, the Justices are Judges competent, if partiality be committed in any criminal cause,

as for instance, if a Sheriff should execute any Pannel, upon a Crime proved only against him, by the pursuers brothers, or other inhabile witnesses, or upon a Libel, which were palpably irrelevant, in these, and in such other criminal cases, the Justices and not the Council, would be only Judges competent; nor is partiality in civil cases, a Crime by our Law, though it be punishable by this Act, *pæna arbitraria*: and by refunding of the damage sustained by the pursuer.

The foresaid Laws strike only against partiality, in general, but bribing is expressly discharged, by the 25. *Chap. Stat. R. William*, but there is no punishment there express; and therefore *Skeen* adds in his observations, the punishment of *l. i. cum authentic. c. de pæn. judic.* And thereafter, by the 22. *Chap. 1. Stat. Rob. 1.* all Judges are forbidden to take Land, or any thing else, to Champart, either for giving, deferring, or prolonging of justice: and the offenders are to be in the Kings will, and to lose their office for all their life. Champart is a *French word*, signifying *part. du champs*, a part of any Land; so that by a Metaphor, the taking any part of the advantage, arising by any plea, is forbidden by this Statute, which the Civilians call *pactum de quota litis*, by the 104. *Act 7. Parl. F. 5.* consulting, or giving partial judgement, is declared bribing in a Judge, and such as disfigure them as bribers, are punished, *lege talionis*.

But because these Acts were not clear against bribing; therefore by the 93. *Act 6. Parl. F. 6.* the taking of bribes, is discharged to the Lords of Session, their Wives, and Servants, under the pain of infamy, deprivation, and confiscation of all their Moveables; to all which, an arbitrary punishment is adjoined.

It is very observable, that by this Act, not only the taking of bribes is discharged, but even the taking any goods or gear, during the depending of a Plea; or from such, as shall have

have causes depending for the future: and though it seem'd very reasonable, that men should not be discharged of the effects of their friends liberality, and should not be, by being elected Lords of Session, put in a worse condition, then the other subjects; yet so jealous is the Law of bribing, that it is afraid, that if Judges be allowed, to take at any rate, or upon pretext of their friends liberality, they might abuse this pretext, to meer bribing, *l. ult. c. h. t. l. 4. ff. eod.* And yet the Gloffe, *ad l. 1. ff. h. t.* allows a Judge to take from his relations, within the sixth degree; nor is it lawful to take any thing, even by way of remuneration, though remuneration be rather a paying then a gitting, *Mathews P. 619.* But I conceive, that this must be understood, of a remuneration made for services, done during a Plea, or upon the accompt of a Plea, or upon any publick accompt. But it seems against reason to think, that if a brother, or brother in Law, should entertain his brothers family, whilst he is a Judge, that he may not receive a remuneration for that, or the like kindness.

The second observation from this Act, is, that it is not lawful for their wives, or servants, to take bribes, or good deeds, which is consonant to *l. 1. C. h. t.* by which the Judge is lyable to pay the quadruple of what his servants take; but it would appear, that none is lyable by this Statute, for what his servants take, except he know that his servants take by command, or ratihabition; for this Statute discharges Judges to take by themselves, or their wives, or their servants, which implies some Act of the masters; *for qui facit per alium facit per se*, but he who is absolutely ignorant of what his servants doth, cannot be punished for anothers fault, against the common rules of Law, else the master should be made a slave to his servants, who might at his pleasure force him to what he decided, or else by taking bribes, might ruine both his masters estate and reputation.

Since this Statute discharges only the Lords of Session, it may be doubted, if it should extend to bribes, taken by other Judges: For Laws in criminal cases, use not to be extended; and since the Lords of Session may by bribing, do more injustice, and prejudice the Leidges more then others, it may be alledged, that other Judges ought not to be so severely punished as they; and yet since the Crime of bribing is punished by the Civil Law, and Law of Nations, in all Judges, it seems just to extend this Act to all Judges; and the rather, because though, *lex julia* was made *contra principales magistratus*, yet it was by the Roman customes, extended, *ad magistratus urbanos*, Math. P. 617.

III. The taking of bribes, or good deeds, was punished by the Civil Law, *Per. l. jul. Repetundarum*. By which, *tenebatur qui in magistratu, potestate, curatione legatione vel quo alio officio munere ministeriove publico quid acciperet quo magis aut quo minus officium faceret, l. 1, 3, 4, 6. ff. de l. jul. Repet.*

The punishment of *crimen repetundarum*, was death, if Money was taken, to pronounce a capital sentence unjustly, *l. 7.* or banishment, and confiscation of goods, in case no such criminal effect followed, *ff. 38. de penis*, and though some Doctors teach, that albeit it be capital to condemn an innocent man, yet to absolve a guilty man who deserved death, is only punishable by banishment: But if the Judge received Money, or committed gross iniquity, that should be punishable by death also, for *l. 7. b. t.* doth not distinguish these two cases.

This Crime is by the Doctors, called *baratria*, *nam baratriam committit qui propter pecuniam justitiam baratriat. Farin. Q. 3. art. 10.* And they conclude, that by the present customes of Nations, it is only punished arbitrarily, not exceeding banishment, *Boß. de offic. corrupt. He num. 6.*

He also who corrupts the Judges, is punishable with the punishment of falshood; *gloss. ad l. qui explicandi, C. de accus.* which holds, though the Judge accept not the bribe, he is punishable, if the endeavour *pervenit ad actum proximum*, *Menoch de arb. cas. 343.* He also who corrupts the Judge, or Clerk, loses the cause, *Far. num. 126.* But I differ from him, in that he thinks, that a Pannel who corrupts the Judge in a criminal cause, ought not thereafter to be allowed a liberty of proponing a defence: for an innocent man may by fear, be driven to offer to redeem his own life, to which inclination, the Law indulges very much.

The Judge who judges unskilfully, *per imperitiam*, is punishable by a fine, beside that, he payes the expences of the plea, *l. fin. de var. & extr. crim.* But *Bossius* and others, are of opinion, that he is never to be corporally punished; and by the 17. *Act 6. P. Ja. 2.* only such Judges are to be punished, as treipasse wilfully in their office.

Arbiters bribing, are punished as other Judges; but some Doctors do justly conclude, that arbiters are not liable for their unskilfulnesse, since they were choosed by the parties, who should blame their own election.

Delegat Judges, such as these, to whom the Lords recommend perambulating of Marches, are punishable for bribing, but for the same reason, they are not punishable for their unskilfulnesse.

Assessors taking bribes, are also punishable, but some think them not punishable for unskilfulnesse, since the Judge is not obliged to follow their opinion: and though some think, that an Assessor, getting a salary, is liable even for his unskilfulnesse, *Curt. Jun. ad l. 2. ff. quod quisque juris*, and he should have known that he was named Assessor, to supply the unskilfulnesse of the Judge. Yet I differ, for he gives only his advice, and so is liable only as an Advocat is.

V. Judges.

V. Judges negligent in putting Laws to execution, are punishable for their remissnesse and negligence, *c. 14. R. 2.* by the escheating of their moveables, and their life is to be in the Kings will, which seems too severe a punishment for meer negligence; but by the *26. Act 5. Par. Ja. 3.* a Judge found culpable (which word may comprehend negligence) is to be put from his office for three years, if he be an Heritable Officer: and if he be not Heritable, he loses his office. Which distinction, I find also observed by *Bald. ad l. municipia, ff. de serv. fugit*, where he says, that *pro negligentia iudex removetur ab officio, sed hoc non tenet in iudice perpetuo* and *Farin. 2. 3. n. 423.*, is of opinion, that *maiores officiales non removetur sed minores facile removeri possunt.*

TITLE XXVI.

Deforcement.

To whom was the execution of Law committed by the Romans and to whom by our Law.

What is Deforcement, and what are the several degrees thereof.

The Messenger must have his Blason, and give an execution of Deforcement.

*Whether may a Messenger be deforced, who wants his Cap-
tion, or transgresses his power.*

*What witnesses can prove a Deforcement, or if the Messen-
gers execution can prove it.*

These who deforce, may be pursued Civilly for the debt.

Aws are only the *idea* or picture of Justice, but execution is its life; and though those who have the execution of laws and Sentences committed to them, be ranked but amongst the lowest servants of Justice; yet they have the happiness to be these who compleat that great work, and amongst whose hands it becomes perfect; and therefore the Laws hanging committed its most excellent part to them; it should be, and is, in a most eminent way careful of them; and in providing for their safety, it secures its own honour.

The execution of sentences was committed amongst the Romans to the apparitors mention'd of the *Codex*, in three several titles, and these were erected in a Colledge, which was still, *collegium*, or *familia apparitorum*, as our Heralds are in a
frater-

fraternity, by the 125. *Alt. Parliament*, 12. K. F. 6. The Italian Doctors call them now, *Beroarii*, so that these who would know what the doctors hold in cases of deforcement, must look to the Indexes, at these words. According to the Roman Law, it was a species of *lese-majestie*, to resist the execution of sentences, *l. quisquis ad l. Ful. majest. l. Julianus ff. de officio ejus cui mandata est jurisdictio* and *Guid. Pap. quest. 557.* observes, that from these Laws does rise the practise in France, *qua puniuntur capitaliter verberantes apparitores, in executione officii nam qui mandata principum exaquantur videntur viva principum imagines ac adeo graviter puniri debent ac injurias Statuas principum.*

With us the execution of sentences, is committed to Heraults, Pursevants, Messengers, Macers, and the executioners of sentences of interior Courts, to the respective officers of these Courts; and the resisting, beating, or wounding, of these, in the execution of their office, is in our Law the Crime which we call Deforcement, *Leg. Burgal. cap. 135.*

II. Deforcement then is defined to be that Crime which is committed in opposing Macers, Messengers, or any other who use to execute sentences, whilst they are executing the office; And upon that accompt, so that if either the Officer was not in execution of his office, or if the Officer be beat upon any other accompt, as if a scuffle should arise, occasioned not justly by himself, this would not infer a deforcement, as shall be said hereafter.

Though this crime be amongst the most atrocious, because the King and Sovereign power is in their person despised, and therefore this crime is called *Dispectus Regis stat. Williel. 4. verse 5.* And Justice is after much pains taken by the Judges, and expences layed out by the Parties disappointed; yet it is only punished by confiscation of moveables, and an arbitrary imprisonment, and the one half of the Moveables so escheated, falls to the King, and the other half to the Party at whose instanc

instance the Letters were execute, *J. 6. P. 12. cap. 150.* The words whereof are, If an Officer of Armes, or Sheriffs in that part, or other person whatsoever be deforced, molested, invaded, or pursued, to the effusion of their blood, by any person or persons, whom they shall Summond, or others of his causing and command, the time he is executing of any Summonds, Letters, or Precept direct by His Highnesse, or other Judges that he shall losse, &c.

From which Act it is to be observed, 1. That Deforcement is committed by troubling of any Officer belonging to any Court. 2. That those words, (to effusion of their blood) seem to be a quality put in a sentence by it self, and so may be thought to relate to all the former words, *molested, invaded, or pursued*, yet the words of the Act are only wrong pointed, and these words, *or pursued to the effusion of their blood*, should all be put in one sentence, for, *de practica*, simple opposing, or molesting the Messenger, though without blood, will infer a Deforcement. 3. Though by the Act it would seem only these against whom Letters, and Charges are raised, or such as they hound out, can be guilty of Deforcement, yet if any others do deforce a Messenger, though they beneither the parties interested themselves, or hounded out by them, yet they are likewise guilty of Deforcement: As is clear by the 4. *cap. stat. Williel. vers. 1.* And by the 84. Act, 11. *Parliament K. J. 6.* And seeing the crime lies in the opposition to the Messenger, whoever is guilty of that act commits this Crime. 3. Though this act make only causing or commanding a crime, yet certainly if any person interested does ratihabit the Deforcement committed by any other person, by either giving him good deed, or by receiving his Letters, or Blason taken from him, he is *eo ipso* guilty of Deforcement: As the Council found in the case of the Earl of *Seafort*, against the Lord *Mackdonald*, anno. 1669. upon full debate: In which case the Council did ordain, that for the future, all Land-

lords in the *Highlands* should be lyable for deforcement committed upon the grounds, if they did not deliver up the offenders. 4. Though the execution be disappointed and stopped, yet is declared by the Parliament to be as sufficient as perfected: and it were unjust, that the party having done all that in him lay, that the disappointment, *eo casu*, should be prejudicial to him. 5. Seing the punishment of this act, is only confiscation of Moveables, and imprisonment; whereas by the Act 84. 11. *Parl. K. F.* 6. The lives and goods of the offenders were to be in the Kings will; It may be doubted whether the Judge may punish by either of the Acts, seing the last does not expressly abrogate the first, or whether both should stand in vigour and force. Concerning which question, the general Lawyers have very many learned debates, but the most solid and appoven conclusions are, that when a crime is punished by several pains, in several Laws, or Acts, which Acts do not derogate one from another expressly, that it is in the election of the Judge, to punish the delinquent, by either of the pains, *l. quoties ff. de actionibus & obligationibus*. But the Judge making election of one of the pains, cannot thereafter make use of the other: *l. ff. senatus de accusationibus, vid. Cabal. resol. criminal. cap. 3.* where this general question is fully handled; and to the considerations there adduced by him, I would adde this, that where there are several punishments appointed by Laws, whereof the one derogates not from the other, that the Judge should follow that of the two which is most in use: And therefore seing Confiscation of moveables and imprisonment, is alwayes used in this case, that punishment should be certainly followed by the Judge: for since custom may antiquate Laws, and is a warrant for a Judge, to proceed criminally where there is no Law, it should much more determine betwixt two Laws, which of them should be followed: But there is the less difficulty in this case, that none of the acts makes deforcement to be capital. And these words,

that their lives shall be in the Kings will, do not infer, *de jure*, the pain of death, as is elsewhere fully debated: but it may be doubted, if their persons may not likewise be punishable, seeing not only by the former act are their lives to be in the Kings will, but likewise by the seventh Act, 17. *Parliament*, *J. 6.* It is declared, that deforcement of Officers shall be punished by the escheat of their moveable goods, and punishment of their person according to the Laws of before: So that there is *geminatio legum*, which makes the Law much stronger: And I remember that some Sea men in *Bruntisland*, having rowed off their Boat when the Customers Officers were about to poynd some unfree goods, bought out of Captain *Dewars* Ship, by rowing off, of which Boat the Messenger who was to Poynd, fell in the Sea: The Commissioners of the Thesaury did summarily in *July*, 1669. ordain the Sea-men to be whipt, which was accordingly done.

III. Messengers have as the Badge of their Office, a Blason bearing the Kings Armes, and a Wand of Peace if they bear not the Blason, it is believed (and that is the first objection against the conception and relevancy of the Lybel) they may be deforced, because by that act only people are obleidged to know that they are Messengers, and the Wand of Peace is that whereby they touch a Rebel, and declares him to be their Prisoner, and when they are deforced, they use to break the Wand of Peace, but though their Libel bear alwayes that the Wand of peace is broken, yet if the troubling of the Messenger be proven, though this quality be not proven, the assize will still find guilty, as was found in the case betwixt *Murray* and *French*, 13. *July*, 1669. where it was likewise found that albeit ordinarily the Messenger who was deforced, doth give in with his Libel, an exemption of deforcement, wherein after the ordinary form, he relates how he execute the Letters, and how and by whom he was deforced, yet that execution is not abso-

lutely necessary for proving the deforcement; but that the deforcement may be proven by witnesses, for else there could be no deforcement, if the Messenger were killed, so that he could make no execution: or if he were bribed by the deforcer, and so would give none, but that an execution of deforcement was only necessary to the effect the Letters might be reputed as validly execute, as if they had been really execute.

It uses sometimes to be alledged against the relevancy of the Libel in this crime, that the Libel is not relevant, because it bears not that the Messenger had the letters of Caption in his hand, and shew them to the Party whom he apprehended be vertue of that Caption, for without seeing of the Letters, the Party is not obliged to obey, and if it were otherways, any man might take a free Lidge, and keep him till he should get a Caption, though he had none at the time of the execution. But upon the 19. of February, 1672. Gordoun of Brax was found guilty of deforcement, though the Messenger having a Caption, was neither libelled nor proved, and that because the Rebel did not crave to see a warrand, and the Messenger was answerable if he did execute without a warrand. Neither did the Lords think that the Messenger was bound to put the warrand in the Rebels hands, lest he should destroy it: But he was bound to shew it to any disinteressed person who was present. In the same Proceſs it was likewise found, that a Messenger might execute a Caption under silence of night, though it was pretended that this might give a colour to Robbers to enter in to honest mens houses under night, upon pretext of executing of Captions; though Poyndings indeed cannot be execute after the Sun is set, because a Poynding is sentence, and requires *formam judicii*, and no Court can be kept under silence of night. Some Judges ordain Officers to take Raes from a Mast, and arrest Ships, without a written order, the haste of the execution so requiring; and therefore I think

that though such have not a written warrand, they cannot lawfully be opposed: for it is the duty of all good Subjects to inquire first if he who pretends to have authority, have it already, though he see no written warrand, but not rashly to oppose what may be lawful.

Another ordinary objection against the Libel is, that the Messenger and his assistants did transgress their power and warrant, and so it was lawful to resist them: and thus upon the 18. of Novemb. 1667. Mr. Archibald Borthwick being pursued for deforcement, it was alledged, that he compeared as Procurator for the Lord Borthwick, who had arrested Sandilands, and the Tennents Corns, as Master of the Ground, and so alledge'd the Messenger could not poynd the Corns till the Master was payed, wherein the Messenger did unjustly, and so he had good reason to stop the poynding: This alledgiance was found relevant, but if justly, it may be doubted. And Lawyers are very positive, that no man can stop any execution, upon such pretence of injustice, where the injustice can be no otherwise redressed, by appellatiō, or otherwise: which they call *resistentia licita per subsidium*, Menoch. de recup. poss. remed. 8. num. 30. & 31. Cabal. resol. crim. cas. 132. And their opinion seems most just, for it were dangerous, to make private persons, and such also as are interested, Judges to the justice of what is done against themselves. 2. *Nunquam recurrendum est ad remedium extraordinarium, quamdiu locus est ordinario*; but so it is, that if a Messenger do any wrong in the execution of his Office, he is lyable therefore, *ad damnum & interesse*, and finds caution for that effect to the Lyon at his entry. 3. Messengers are Judges in poyndings, and it is not lawful to resist Judges upon pretence that they judge unjustly: And this suggests to me another distinction, which is, that either a Messenger or Executer doth wrong the party interested, *vis juris*, as in omitting formalities, and revealing just allegiances, & *eo casu* he cannot be resisted: or else

else he does wrong, *via facti*, by beating the party he cites, or giving him opprobrious speeches, by apprehending him without a Caption, or after a Suspension is produced by him, or otherwise giving rise to the violence used against him, & in *casu* he may be resisted, as was found, *Mart. 1662*. And is clear from the Doctors, *Cabal. ibid.* It hath been alledged that there could be no deforcement at the Messengers instance against the Pannel, for stopping him to poynd goods, because the Messenger was the person at whose instance the Letters of Poynding was railed, and therefore he could not execute them himself, seing no man can be Judge in his own cause, and the Messenger is Judge in all Poyndings; but this was repelled, because the Letters of Poynding are alwayes blank in the persons name to whom they are direct, and so the Messenger might fill up his own name, and no Messenger was excluded, and if the Executer did any wrong, he was lyable to a spoilzie, and his sentence was reduceable; but this wants not its own scruple, seing Messengers are Judges when they poynd, and no man can judge in his own cause. 2. It was here alledged, that the Letters upon which Execution were used, were suspended, and so could not be put to execution, which alledgiance was repelled, because the Suspension was not intimate, and so the Messenger nor Party was not thereby put in *mala fide*, *Mart. 1662*.

Though this be the punishment of deforce, when it is purely such, and is not aggravated with other hainous circumstances, yet if a Messenger were executing Letters of Caption against a Traitor for Treason, any who would deforce him would commit Treason, and that were to be art and part of Treason: and so in other Crimes; but whether deforcement may be punished in our Law, as breaking of Prison, I doubt very much, though it be a rule amongst the Doctors, that *eximens aliquem ex manu familia, & ex carcere à pari procedunt, & carceratus*

icitur non solum qui in carceris mansione degit, sed & in satellitum custodia, & in familia manu reperitur: nam dem modo utriusque leditur majestas principis, & offenditur ministerium justitiae, Cabal. resol. crim. cent. 1. casu. 8.

V. Deforcement then is proven as other crimes; by witnesses, and who ever may be witnesses for proving other crimes, are admitted here, but it hath been oft doubted, whether the witnesses who were carryed along with the Messenger verifying his executions, may be sustained as witnesses to prove the Deforcement: and the reason of the doubt was, because ordinarily they are injured themselves in such cases, yet at it was decided in *March, 1662.* that they were very receivable witnesses, because without these, deforcements could not be proved: And since the execution could be proved by them, they are not deforcement. But it is a necessary caution in that case, that no injury be pursued as done to the witnesses, for if they be once libelled, they become parties, and will not therefore be received as witnesses, though they should offer to pass in the injuries, as done to themselves. And these witnesses are so receivable, that in the case betwixt *Murray & French, July, 1669.* It was found that though they were within the degrees defendant to the pursuer, yet they might be received, because in effect they were *testes instrumentarii*, being witnesses contained in the execution of the deforcement; but I think, this is debateable, because *testes instrumentarii* are only allowed in obligations, though within degrees, *quo casu* they are to be presumed to be chosen with mutual consent, which cannot be alledged here, seeing the Messenger only chooseth such witnesses as he pleases.

Whether the execution of deforcement; will prove that the Messenger was deforced, without leading any other witnesses, may it be doubted; and that it should, appears from the grounds, 1. That it is a principle in Law, that *creditor in his qua spectant ad ipsorum officium.* 2. In civil law, The execution of a Messenger is alwayes believed till it be

be improven. 3. Lawyers are very clear, that *creditor nuncio, si referat se fuisse percussum vel verberatum in ipsa executione*, which *Guido papa decis.* 628. declares to be the custom of France in Dauphinie: And this is enacted by a statute of France, 13. June, 1559. Yet by our Law the execution of Deforcement, will not prove that the Messenger was deforced, and *Caballus* declares this likewise of most other nations besides these abovesaid, *Casu* 127. According to our Law the Messengers who were deforced, cannot be led even as single witnesses, though the pursuite be not at their own instance but at the instance of the party injured, or his *Majesties* Advocate: In which case it seems that all their interest ceases; but the reason of this is, because it is presumable that the parties who were wronged will still retain a resentment against the injured, and so will still be prejudicial witnesses in that case. But yet according to the Doctors, this is doubted, and many of them conclude that *creditor nuncio se verberatum fuisse, nam creditor ei secundum omnes in iis quae pertinent ad suum officium & hoc est conexum relationi executionis sibi demandata*. Menoch. de Arca. cas. 112. *alii vero credunt casum hunc esse arbitrium*. According to our Law, such as were witnesses, chosen by the Messenger to go along with him in using the execution, will still be received witnesses, though they were themselves beaten in the deforcement, and so are liable to the former suspicion equally with the Messenger: and the only reason of difference that can be assigned, is, that the Messenger is himself said by our Law to be deforced, and so is the person formally interested, but witnesses are not in our Law said to be deforced, though they be received ordinarily, yet it is given as a caution that they shall not depose upon any wrong done to themselves: for if they do, it will make them though otherways habil, be rejected from being witnesses, and the Law will *eo casu* look upon them as persons that remember too much the injury done to them; It may be likewise in this case doubted, whether

ther though the witnesses taken along by the Messenger to the execution, cannot be rejected upon that accompt, after they have purged themselves of partial counsel and malice, if they may not be rejected, it before they be sworn they confesse they continue to have a resentment of the injury done them. And in my opinion, if this beating and injury suffered by them, be confest by themselves, before they be purged of partial counsel, they should be rejected, though the parties interested, and at whose instance the Letters were execute, cannot be received witnesses to prove a deforcement, even though they should declare that they would never pursue the deforcement, *ad proprium interesse & vindictam*: yet such as were within degrees defendant to the party, were received witnesses, even where the pursuit was pursued by their own friend, 13. July, 1669. *Murray against French*. Upon a new pretext, that brothers and servants, &c. are habil witnesses, where they are *testes instrumentarii*, and witnesses in executions are *testes instrumentarii*: but in my opinion there is a great difference betwixt these two, for the reason why *testes instrumentarii*, are received, though they be other-ways *in habiles*, is because they are chosen of common consent of both parties who are present at the subscription; but that cannot be alledged in such as are witnesses in executions, who are only chosen by the Messenger himself.

After this crime is proven, the ordinary verdict is, The Assize finds the Pannel guilty of Deforcing such a Messenger. But yet where the Assize find only the Pannel guilty of troubling the Messenger in his office, and would not find him guilty of deforcing: The justices finds these termes to be equivalent, and punished the Pannel as a deforcer, in the case of *Robert Herris, July, 1667*.

VI. The party deforced, has beside this Criminal action, a Civil action for deforcement, against such as have been ac-

cessory to the deforcement, for payment of the debt : which debt is ordained by the 117. *Act*, 7. *Parl. Fa. 6.* to be payed, together with the modification of his expences out of the first and readiest of the deforcers escheat : And it is declared, that he shall be preferred to the King. From which *Act* these two doubts may arise, 1. Since by the *Act* it is declared that the persons convict of deforcement, shall be lyable for payment of the debt, by this Civil Action, that therefore this Civil Action is not competent, until the Parties pursued be first found guilty of deforcement : But yet it was found, the 25. of *July*, 1663. in the case of *David Mitchel*, that the party injured might pursue, either Civilly, or Criminally; and that this priviledge was introduced by that *Act*, as a further advantage to the party deforced; but because this Action was founded upon a Criminal ground, therefore they ordained the deforcement to be proved by most unsuspect Witnesses. The second doubt is, whether by this *Act*, the deforcers other Estate be lyable to this Action, as well as his Moveables : And though it may be urged, that that *Act* appoints only the Creditor to be preferred to the King, and to be payed out of the first end of the deforcers Moveables. Yet it was found, the 13. of *December*, 1672; in this case, *Murray* against *French*, that this *Act* did allow Action for payment, *simpliciter*. For the Lords thought, that the *Act* did in the first place ordain payment of the debt, and expence; that the preference was a new superadded priviledge : And it were against all reason, that the Creditor should be frustrat of his Action, because the Deforcer had no moveables, though he had an opulent heritable Estate.

In this case it was likewise found, that the Party de-
forced

forced might pursue, either *ad vindictam publicam*, Criminally, or might pursue Civilly this Action for damage and interest; and that the one Action did not consume or exhaust the other: And therefore though the Pursuer here had prevailed in a Criminal pursuit against this Defender, *quo ad vindictam publicam*, that yet he might pursue this Civil Action for damage.

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TITLE

TITLE XXVII.

Falsum, Falshood.

1. *The several species of Falshood by the Civil Law.*
2. *The producers, or users of false Writs, commit Falshood.*
3. *The punishment of Falshood by our Law.*
4. *The Lords of Session are only thereto in the first instance.*
5. *The Lords proceed in the tryal of Falshood, either summarily, or by way of action.*
6. *The direct and indirect manner of probation.*
7. *After the Writs are improved, the forger is remitted to the Justices.*
8. *False witnesses, how punished.*
9. *False Coyners, how punished.*
10. *False Weights, how punished.*
11. *The assuming a false Name, & suppositio personæ falsa, how punished.*

FALSHOOD is by the Civilians, defined to be a fraudulent suppression, or imitation of Truth, in prejudice of another; it was by them divided; in *falsum quod ipsa lege Cornelia vindicatur* & *quasi falsum quod senatus-consulto & constitutionibus vindicabatur*, Matheus hoc, tit. But suitable to our practice,

practice, I shall divide Falshood in these four Branches,
1. That Falshood, which is committed in writ. 2. That
which is committed by witnesses. 3. The forging and falsi-
fying of Money. 4. The using of false weights, and mea-
sures.

I. As to the first Branch, he commits Falshood, who ei-
ther expresseth in writ, that which was not done, or omits
to expresse that which was done. So that Falshood in writ
may be committed, either in commission, or omission.
Falshood is committed by commission, either by fabricating a
false writ, or by signing it, or causing another sign it, *qui in-
strumentum falsum dolo malo scripserit, signaverit, vel signare cu-
raverit, recitaverit, mutaverit, subjecerit, amoverit, celaverit, de-
rogerit, interleverit, resignaverit*, all which species of Falshood,
are enumerat by *Ulpian. leg. 2. ad leg. Cornel. 9. §. penult l. 1.
C. de falsis Cod. ad legem Cornel. de falsis*, which are prettily ex-
press'd, but much more fully *l. 2. Basil. περι πλασαν*. In these
names, *ὁ κλέψας διαθήκαν. ἡρπάσας ἡ παλαιοφας. ἡ υποβαλὼν ἡ παρ-
οχτας ἢ πλατειςας ἢ σφραγισας, ἡ κατὰ δόλον ἀναγινοσκαν ἢ δολικῶς
μεκινευσας ταυτα γινεται*, with which, *Theophil. dif-
f. 1. §. 7. τιμωρνος τὴν διαθήκην ἢ ἑτερον συμβουλιον γε-
νηται ἢ ἀναγνοντα, ἢ υποβαλλοντα*. And the punishment of Falshood,
is very different, according to the several kinds and degrees
of guilt, as will hereafter appear.

II. Falshood in writ, is committed by producing a false
writ, if they know it to be false, which some Doctors think
punishable only, if the writ produced by them was suspect;
if it is said to be suspect; if either it appear vitiat by occular
defection, or if the writer or producer used to produce false
writs, or if it contain things that are improbable.
The user of false writs is said to commit Falshood, *l. 1. majo-
r Cod. de falsis*. which only holds, if he knew the writs pro-
duced by them to be false; and therefore *Clarus* relates a
maxim used by the practitioners, which is, that the user of
the

the writ gets a dyet affixed to him, to deliver at, if he will abide thereby, and at the day affixt, he must either simply abide thereat, without any qualification, *quo casu*, if it be improven the user is punished as a forger. Albeit the Doctors commonly are of opinion, that even in that case, the user is to be more meekly punished than the fabricator, *scilicet relegationis*, which caution is likewise in use with us, but in this we differ, that by our practise, the user will be allowed to abide by the writ, though not simply as a writ true, yet as a writ really made over to him, and in the forging whereof, he had no interest, as in the Earl *Levins* case 1665. but though this qualified abiding at the writ, be allowed in an Heir, or singular Successor, yet that it is only allowed where there is some person extant, who abides simply at the writ, as true as *Kennedy* did in this case, for the user, though a singular successor, must abide at the writ as a true writ simply; without which, any false writ might be vented securely.

The counterfeiter of the King's Letters, for which *Binn* was hanged. The opener, and unsealer of privat letters, from which *Bart.* likewise concludes, that Advocats, Writers and others who reveal their Clients Papers to their Adversaries, and, the sealing other mens Letters with the Sealers own Seal; and revealing the secrets of a Town, commit likewise Falshood.

5. A Nottar who draws any unlawful writ, *verb. gra.* a usurious Contract, commits Falshood, but not in Scotland.

6. A Nottar who expresseth any thing that is false in an Instrument, commits Falshood, as if he say the Money was numbred where it was not, or if he marked persons to be present, who were not, but with us, a Nottar commits not Falshood, though he say in the writ which he draws, that the Money was payed, whereas it was not. I find that *Ja*

de sancto Georgio ad l. de quibus ff. de Legib. observes, that consuetudo loci excusat notarium à pena falsi eo casu.

III. Falshood in writs is committed by omission in not setting down what the Nottar was desired to set down in his Instrument, or omitting to express the day and place when the committing thereof might have been disadvantageous. In our Law he of old who falsified the King, or his Superiors Charter, committed Treason; but he who falsified only the Charter of a private man, was only to be punished by loss or mutilation of a member, *Reg. Maj. l. 4. Cap. 13. num. 4. &c.* or should be in the Kings will, *lib. 30. cap. 8.* But therefore it is determined, *Stat. Alexander 19.* that the forger of a Charter is to lose the right hand; and *Clarus* tells us, that in the *Dutchie of Millan*, and several other places, a false Nottar is only punished for the first Crime, by losse of his hand, but all this is innovat with us, by the *6. Parl. 80. Act 4. 5.* whereby it is appointed, *that these who make false instruments, or causes them be made, or uses the same wittingly, shall be punished for the same in their person, and goods, with full rigour, according to the disposition of the Civil and Common Law;* but because that Act punished only false Notars, and express only false Instruments, therefore by the *22. Act 5. Parl. 2. M.* It is extended to all evidents; but it would appear that it is not extended to all persons, but only to Notars, both by the rubrick and body of the Act; from which it may be inferred, that *in criminalibus non est argumentandum à priori ultra casum à lege definitum.* And that criminal Laws are to be most strictly interpret, for else the former Law against Instruments, might well enough have been extended against other false writs, which are oftentimes of greater consequence, then Instruments are. 2. The reason why Nottars are more severely punished then others, was, because they were more trusted then others, for of old they were Church-men, and hence springs that custom, that they yet design themselves, *Ego. A. B. Nota.*

Notarius pub. Dioceseos Andreopolitana Rossensis, &c. And any Paper subscribed by them was sufficient, though not subscribed by the Party. 3. The punishment is declared to be prescription (which is an error of the Printer, put for prescription) banishment, and dismembering of Hand or Tongue, but because it is received amongst the Doctors, that a Statute punishing Falshood in a Notary, cannot be extended to any other person who is a forger, *fulgos consil.* 123. therefore by the *Act 22. Parl. 23. Ja. 6.* It is statuted, that whosoever maketh or useth a false writ, or is accessory to the making thereof, shall be punished as a committer of Falshood.

And that these and all forgers of writs may be punished, albeit they declare in Judgement, that they passe from, or do not use the writ quarrelled. From which it may be intended that seeing the forger is only not allowed by this *Act* to pass from the writ, after it is used and produced in Judgement, that before it be used in Judgement, it may be past from, as as the using in Judgement is a further prejudice, and degree of impudence, then a simple forgery which may be repented of; So in all tryals of Falshood, and particularly in *Barclay's* case, the Lords took great pains to enquire, if the writs quarrelled were produced in Judgement, or made use of before any Court, which had been unnecessary, if simple forging had been sufficient, to infer Falshood: but although this may be alledged, for mitigating the punishment, yet *Dempster* was condemned for counterfeiting a subscription, in a reverend though he never used the same, to the hurt of any person whatsoever, nor would abide thereby; and a sentence was found upon this *Act*, 20. April. 1620.

These who give a false Testimonial to any man, where it may be used as another mans Testimonial, or forges one himself, is punishable by death, *Act*, 10. Parl. 3. *Ja. 6.* But this *Act* seems only to relate to the

hers, and such fugitives, as run in from Scotland to England.

Though England and some other Nations, punish Theft with death, and Falshood only by the pillary, and confiscation of moveables: Yet our own Law seems much more reasonable, which punisheth Falshood with death. Since Falshood is a theft, and a degree of that crime, which deserves a much severer punishment, then ordinary Theft, because I can secure my goods against a Thief; but no man can against a Forger. And a thief can but at most steal our Moveables, whereas a forger can by a false writ, take away the property of our Lands, and things of the greatest consequence.

By the Civil Law, *l. 1. ff. de l. Cornel. de falsis, s. ult. pana falsi, vel quasi falsi, deportatio est, & omnium bonorum publicatio: & si servus eorum quid admisserit, ultimo supplicio affici debetur*, which is in terminis, renewed in the Basilicks, only in place of *publicatio omnium bonorum*, the Basilicks have *plenam publicatio*, *talasia* *inquisitio*. But Theophil. omits absolutely, *publicatio bonorum*, and makes it to be simply, *capital*, or capital; the reason whereof seems to be, because capital punishment included necessarily publication, or escheat of goods, *l. 1. & 2. ff. de Bon. Dam.* and albeit the former punishment exprest, *l. 1.* holds generally in Falshood; yet there are some kinds of Falshood otherwise punished, because in effect, they fall in to be branches of other Crimes. Thus the assuming of false Arms, *aut qui militiam confinxit concutendi causa* is capital, in Mathews judgment, *per l. 27. h. t.* because it is a kind of *Lasc-majestie*. But I find by the Law it self, that the pain of death is not exprest in that case, *sed pro admisso qualitate gravissime puniendus est*. And by the Basilicks, there is no punishment exprest, to that special kind of Falshood, and so it is left only punishable, *tantum falsum*. And though Mathews doth inter this to be capitally punished, from *l. 3. l. jul. Majest.* Yet I think there is a great difference, be-

twixt a mans pretending falsly that he is a Souldier, which is that Crime, which is punished *l. 27. h. 1.* and the taking up Arms against the State, which is punished, *ditt.*, *l. 3.*

IV. Because the Crime of Falshood, doth oftentimes arise upon Papers produced before the Lords of Session, and because the tryal thereof, requires an exact, and long, and much more tedious search, then the forms of the Justice Court can allow (whose dyet is peremptor) therefore by the Acts foresaid, it is declared, that the Lords of Session are Judges competent, to the tryal of Falshood. And albeit that Act doth not expresse their jurisdiction to be exclusive of the Justices, yet I remember, that in an accumulat accusation of Theft and Falshood, pursued by the Lord *Blantyre*, against *Mculloch*, his servant, it was found by the justices, that they would not proceed to judge the Falshood, but remitted the same to be tryed before the Lords, in an improbation: and I believe, that the tryal of Falshood, *in prima instantia*, doth only belong to the Lords, as that of divorce doth to the Commissaries, for else most of all Falshoods would be only pursued before the Justices, seing the tryal there is much shorter, and lesse expensive, than before the Lords; whereas I find not any action of Falshood, *in prima instantia*, recorded in all the Books of Adjournal.

V. The Lords do sometimes proceed to the tryal of Falshood, *summariè per modum simplicis quarela*, upon a Bill, without any formal Summons; and thus they found *Binnie*, a falsfary for counterfeiting the Signet, *Jun 1666*. But this they do only in two cases, 1. When the Falshood is committed, by a Member of the Colledge of Justice. 2. When the Signet or any part of a Proceffe is *ex recenti*, falsified.

The way of procedor in this Crime before the Lords, is this; 1. Summons of Improbation is raised, and continued, and
three

three terms of old, but now two only are by the regulations given to the defender, to produce the writ called for, to be improved. If the Papers called for be not produced, certification is granted against them, whereby they are declared such as can never be made use of, as true Papers, in any time coming; but upon this presumptive Improbation, whereby the Writs are only *perfictionem juris*, declared null, the party who is called to produce them, is not reputed a forger, or punished as such, for *non constat eo casu de corpore de liſti*, or that ever there were any such Paper, as is called for: nor was there ever certification granted, or any further inquiry made, into the Falshood it self, till November 1669. at which time, certification having been granted against some Papers, made by the Tutor of Towie, to Captain Barclay, the Lords found they might proceed a little further, by examining the Witnesses, albeit it was alledged, that this had never been done.

That *non constabat de corpore de liſti*. 3. That by the certification, *res erat judicata*, and so the Lords, *functierant officio*. 4. That the Writs being improved, were no longer dangerous, *non erat amplius nociva & nullus potest puniri de-
le ubi falsum non erat nocivum*; and albeit, it was alledged that it would be very prejudicial to the Common-wealth, if a person who falsified Writs, might destroy them, when he could and they could not be advantageous, and so escape; it was answered, that there was no hazard in this, because, if the person used them not, the Common-wealth, nor no Person could be prejudged; but if he did, the party injured might sue him to leave it in the Clerks hands, and intent an Improbation.

By the 62. Act. 7. Parl. 2. M. the Judge is allow'd to ex-
caution from such as propon Improbation, and though some
doubt whether this caution may be exacted, as well when Im-
probation, is proponed by way of exception, as when it, is
sued by way of action: yet since the danger is the same it

both, and that by the Act, this is declared to extend as well at the raising of the Summons, as at the proponing of the objection, and that *lex non distinguit*, I see no reason for the doubt: and thus, it was decided the 25. of *Jun*, 1675. The Sums for which caution is to be found in this case, is left to the arbitrement of the Judge, and though this Statute appoints only caution to be found, yet the Lords doth ordain the Money oftentimes to be assigned.

VI. There are two ways of improving a Writ, *viz.* the direct and indirect manner, the direct manner of improbation is by the Writer and Witnesses insert, the indirect manner is by Witnesses not insert but by presumptions and other extrinsic arguments. But it is a rule in our Law, that whilst the direct manner of improbation is extant, that is to say, whilst the Writer and Witnesses insert are alive, no tryal can be taken by the indirect manner.

As to the direct manner, we have this general Maxim *viz.* that such Witnesses as are dead, are proving Witnesses but this holds only presumptive, for if of five Witnesses inserted two should improve, the other three being dead, the writ will be declared false; whereas, if these three were alive, and did formally approve, the writ would subsist, though improved by two.

To prevent Falshood in all manner of Evidents, our Law in place of Seals (which were used of old, and which might have been easily counterfeited) did by the 117. *Act 7. Parl. 5.* require that all Evidents should be subscribed by the Party, and Witnesses, and by the 80. *Act Parl. 6. 74.* all writs of importance, are ordained to be subscribed by the principal Parties, if they can subscribe, or by two famous Notars, before four famous Witnesses, denominated by the special dwellings, or by some evident token, by which the Witnesses may be known, and though usually men take writs of the greatest importance, subscribed before any Witnesses

yet there is nothing more imprudent for if I take a Gentlemans two Servants, or a Fathers two Sons (when the master or father are disponers) witnesses to their Disposition, or Bond of the greatest importance, and one of these should deny his subscription, the writ would be null, as was found in Commissar *Fleemings* case, and if both denied their subscriptions, the writ ought in strict Law to be declared false; but yet if there were pregnant circumstances, and adminicles to asstrue the truth of the subscriptions I conceive the writ could not be improven, even though these interested witnesses should deny their subscriptions. From the foresaid Act of Parliament it is clear, that the witnesses should be specially designed, to the end they may be known and examined; and therefore the Lords 21. Feb. 1672. *Littlegil contra Somervell*, found it not sufficient that a witness in a bond craved to be improven, was designed indweller in *Edinburgh*, but ordained even the assigney to condescend more particularly though the assignay contended that he being a singular successor, who had got a right to the bond, he could not know who were the witnesses made use of, nor was he obliged to consider any more when he got his assignation, but that the bond had witnesses, without requiring who these were, and so though the cedent who had gotten the bond might be obliged to condescend, yet he could not; and yet improbation being pursued against a bond granted by Sir *Lewis Stewart* to his son *Kettlestone*, in which bond one of the witnesses was designed *John Carnagy* servitor to the Earle of *Southesk*, though there were many moe *John Carnagies* who then served the Earle. The Lords found that *Kettlestone* was not obliged to designe more particularly which of the *John Carnagies* wrot the bond, and that it was relevant for the improver to offer to prove that at the date of that bond the Earle of *Southesk* had no servant who could write such a bond, 7. February, 1672.

Another great errour committed by such as take men to be wit-

witnesses to the Writs and Evidents delivered to them, is, that they imploy witnesses who has not seen the party subscribe, nor has not so much as inquired at him whether that was his subscription, whereas if that paper were challenged as false or null, it would be declared null, if not false, though the witness should depone that he was in the next room, and it was brought to him immediatly whilst the ink was not yet dry, and that he knew his masters subscription, if he could not positively depone, that either he saw his master subscribe, or that his master had declared to him that that was his subscription. And this remembers me of this pretty case wherein I myself was consulted: A Gentlewoman being to subscribe her contract of marriage desired that because she was ashamed to writ before so many friends, she might have the Paper delivered to her to be subscribed in another room, and the same having been sent with her to the other room, she caused her sister-in-Law who went alongst with her, subscribe the same, for her pretending that she could not write well, and returning thereafter, she told the witnesses that that was her subscription, which Contract being thereafter quarrelled upon the nullity of not being truly subscribed before witnesses, the Lords sustained the Contract, the matter of fact abovespecified, being offered to be proved, though it was alledged that this was in effect to make up an obligation of great importance by witnesses.

In the indirect manner, the Lords use to consider the presumptions adduced for the improver in his indirect Articles of approbation, and for the party accused, in his articles of approbation, amongst which indirect articles, the chief are, *Alibi*, a false date, and *comparatio Literarum*. If the party who has been said to have subscribed the writ, be proved to be elsewhere, as for instance, to have been at *Edinburgh*, whereas the writ is alledged to have been subscribed that same day by him in *Cathnes* this is a very concluding presumption of Falshood, since a man could not by the swiftest journey be at both these

these places in one day, and therefore this is a most concluding presumption to annul the Bond, but I think it is no convincing argument which can infer that the Bond is false, since people by error or mistake, may, and do oftentimes insert a wrong date, neglecting the date, as a matter of no importance; and therefore the Lords did very justly assaile from an improbation of a writ, which was proved to be false in the date, since the witnesses insert were alive, and did depone upon the verity of the subscription, 23. May, 1667. Lord May, *contra Rolfe*, and upon the 10. of July 1669. *Gardner contra Colvil*, a writ was not improven, though it was proved not to have been subscribed of the date that was insert; In respect there was a writ of that same tenour, truly subscribed that day, which being a-missing, the granter a long time thereafter subscribed another of the same tenour and date, and the first being thereafter found, and both produced, the user abode by the first simply, and by the last as to the verity of the subscription, but not of the date, which was so insert for the reason foresaid, so that though the date be amongst the substantial solemnities requisite to a writ, as is clear by the foresaid Acts of Parliament, and by the 13. Act, 9. Parliament, Jam. 1, so that the improver may force the user of a writ, to condescend upon a particular date, if the date be blank, and that the falseness of the date will infer the writ to be false, except this presumption can be taken off by a strong contrary probation, yet that it may be so taken of, is clear from the cases foresaid, and in this sense *Craig* is to be understood, who sayes, pag. 56. *Si falsa data apposta sit, totum instrumentum vitatur, nam quod in ea data qua exprimitur non est verum, etiamsi aliam datam substituere velit, is, qui eo utitur, non est audiendus, & quod in data falsa non fuit factum, nunquam factum presumitur.*

If the writ craved to be improven be unlike in its subscription, to the other subscriptions used by the subscriber at the time.

time when the Paper quarrelled is said to be subscribed, then it is most suspect, and if both the subscriptions of the witnesses and granter, be found to be one hand writ, but all of them are unlike the true subscriptions, then the writ will be improved by ocular inspection: as was found in the Earle of Weymescote, *contra Gall*, July 1675. But yet it were hard to infer the corporal punishment of falshood from this probation, which is but at best presumptive, for the granter of a Bond or other writ, might upon designe subscribe to strangers his name, for other wayes then he uses to do, meerly that he or his Heirs, may thereafter quarrel the same, and therefore *Cravet. Consil.* 386, concludes, that *comparatio sola non relevat in criminalibus*, and all Lawyers conclude, that *recognitio scriptura privata infert plenam probationem si jungatur cum uno teste vel alia semiplena probatione*, *Alex. Consil.* 239.

In the indirec[t] manner, the Lords uses to receive witnesses *ad futuram rei memoriam*, and to receive witnesses sometimes by commission, as in Captain *Barclayes* case. Albeit it was there alledged, that witnesses in the indirec[t] manner of improbation, are only received *ex nobili officio*, which could not be committed or delegat, and which seems stranger, the Lords uses to take the oath of the defender himself, albeit regularly in crimes the defender is not obliged to swear.

Before any debate upon the indirec[t] manner, the Lords use to ordain the pursuer to give in his articles of improbation, and to ordain the defender to give in his articles of approbation. And albeit there be not *publicatio testimoniorum* in our Law in Civil Cases, yet because improbations have a criminal effect, and tend to take away the life of the defender, therefore the Lords use in this case to ordain the depositions of the witnesses to be seen by both parties, and both parties being sully heard to debate *in presentia*, the Lords do either improve or Assolve.

If the Lords improve, they have by the foresaid acts of Parliament

liamed

liament power to impole an arbitrary punishment suitable to the crime. And therefore they do sometimes ordain the forger, to be taken to the Crosse with a paper Hat, if the cheat was but small, or the person in great necessity. And sometimes they only ordain the forger to be imprisoned, and rebuke him without discovering the falshood, as they did lately to a Gentleman, who being otherwayes very discreet, was by his poverty driven to counterfit the subcription of his friend, to a bond of Sulpension. Sometimes likewise they refer the forgers to the Council, who upon that reference, use either to condemn the forger to perpetual imprisonment, as they did Captain *Barclay*, or else they use to send them to the Mercat Crosse with a paper hat, as they did *Tulloch* a Nottar for forging a charter, 4. *July*, 1638 but this mitigation is only allowed, when the forger hath been induced to commit that crime by the perswasion of others, or by his own simplicity, and hath ingeniously confest.

VII. The ordinary way of procedor taken by the Lords, when they have improven the papers, and found them to be false, is to remit the forger to the Justices, against whom an indictment being drawn up, and the Assize sworn, the Lords Decreet is read, without repeating any further probation, and the Assize must condemn thereupon, else they will be pursued for errour. And therefore the verdict *eo casu* bears, finds the Pannel guilty in respect of the Decreet of the Lords of Session. Upon this verdict the Justices are tyed expressly to condemn the defender to be hanged, as *Halyday* for counterfeiting a Discharge, 8. *February*, 1597. *James Tarbet* for being art and part of counterfeiting a false Charter, 16. *February*, 1600. And if the falshood be atrocious, they sometimes before the execution ordain the right hand to be cut off.

If the Lords remit not the case to the Justices, when they find the Papers to be false, they ordain the Papers improven to be cancelled in their own presence, but if they remit

the forgers to the Justices then the Papers are carried to the Justice court, and when the sentence is pronounced there against the Pannel, the papers are likewise cancelled at the command of the Justices.

VIII. The second species of Falshood, is that which is committed by witnesses in their depositions, which may be many wayes committed: as 1. By taking money to depon or not depon. *Si quis pecuniam ad dicendum vel non dicendum testimonium acceperit, l. 20. ff. h. t. 20.* by concealing the truth, or expressing more then the truth, though they received no money, *l. 6 S. ult. hoc tit.* 3. By deponing things expressly contradictory, but in this case the contradiction must be palpable, and not consequential, *nam omnis interpretatio preferendo est ut dicta testium reconcilientur.* Witnesses either are such as were sworn, and if they swear falsely, *ex casu*, they are guilty of perjury (*vid. tit. perjury*) or else they are such as are false witnesses, without an oath, as witnesses in papers, and these are punishable, *tanquam falsarii, Bart. ad l. si quis ff. ad l. Corn. Clar. hoc tit. num. 11.* and of these I design to treat only at least principally in this Title.

He who depones falsely in one point, is reputed false in all his deposition, whether the points be coherent or not; But he who depones falsely only in extrinseck circumstances, is not to be equally punish'd, as if he had depon'd falsely upon the substantial of what is interrogat; and yet in both cases he is *falsarius*. And thus the Lords ordained one of *Barclays* Servant to be sent to the Cross with a Paper Hat, because he prevaricated only in his deposition about the carrying of a Letter, though that was extrinseck to the debate. and was mainly used to try the Witnesses honesty. Oblivion or forgetfulness excuseth sometimes, *à pana ordinaria falsi*, if it be invincibly or strongly founded, but not otherwise.

Witnesses deponing falsely, and such as induced Witnesses were by our Law punished according to the disposition of the

common

common Law, *Act 80. Parl. 6. F. 5.* but thereafter by piercing their tongues, and escheating of their moveables to the Kings use, and are never to brook honour, office, or dignity, and are to be further punish'd in their persons at the sight of the Lords, according to the quality of their fault, *2 M. Parl. 6. Cap. 48.* By the Lords in this Act, are meant the Lords of Session, who may punish Witnesses *ex incontinenti*, during the dependence of the Process before themselves, wherein the Witnesses depone falsly; but if either the falshood was committed by deponing in another Court, or if the Lords be *functi officio*, as to the Process wherein the falshood was committed, *eo casu* the Lords cannot judge the falshood, or punish the false Witnesses. Sometimes the Lords ordain the Witnesses to be remitted to the Council; thus the Lords ordain'd the Witnesses, who had confest that they subscribed Witnesses to a Disposition granted by the Tutor of *Towie* to his Nephew, to be remitted to the Council, who banish'd them: And sometimes they themselves ordain them to be banish'd, or to have their tongues pierc'd, or to be set upon the Cock-stool, with a Paper Hat; yet they cannot ordain them to die, because the arbitrary power granted by this Act, cannot in Law be extended *ad infligendam panam mortis*, as is fully cleared else-where; and therefore the Lords use to remit the falsarie to the Justices, if the Crime deserve death. But it may be questioned, if the Justices can inflict the pain of death in any case upon false Witnesses, since that Crime is not declared capital by any Act? But to this the answer is, that they may, and do inflict capital punishment upon the committers of this Crime, in some cases. And by the foresaid Act 80. it is declared punishable, according to the disposition of the Common Law, by which is meant the Civil Law, & *de practica*, Witnesses have been hang'd for bearing false witness, as *Croy*, and for suborning others to bear false Witness, as *Sheyn*, *March 15. 1605.* And *Grahame*, *March 8. 1615.*

At which time also *Dunlop* and some others were hang'd for offering themselves to be false Witnesses, albeit they did not actually depon, because they were not received, the offer having before their examination come to light.

IX. The third kind of falshood is committed by falsifying money, *falsum nummarium*, which is accounted so great a Crime, that it is commonly excepted out of Remissions, as may be seen in *Crichtouns* Remission, March 15. 1661. This Crime is committed, 1. By forging true money without Authority. 2. By Coyning false money, and impressing Copper, Lead, or any base Mettal, with the stamp of the Prince, or of other currant money. 3. By mixing and allying worse with nobler mettals, in currant Coyns. 4. By venting and passing, or out-putting (as our Law terms it) the adulterate money coyned by others, or intertaining the Forgers, or being art and part *redde*, or of the Council with the Coyners. By the Civil Law, *qui probos nummos cudunt sed non in officina publica tenentur lege Cornelia nummaria, l. 12. C. de falsa monet: qui adulterinos cudunt & qui veros adulterant, radunt, fingunt, l. qui cunque & l. seque ff: hoc tit. qui nummos probos lavant constant aut vultu principum signatos reprobant, l. 1. C. de vet. numis. pot.*

By our Law, every Burgh should have a clipping-house, (which was a house for trying money, for the tryal was by clipping) and sworn men, who should clip evil money, who are to have a penny for ilk pound that is clipped, and the haver was to tyne the false money, *F. 6. p. 1. c. 19.* and the clipped money, if it be evil stuff, or false coyn, should be returned to the owners, *F. 4. P. 4. Att 4.* They who falsifies money, or counterfeits the Kings Irons, are to be justified (*id est* punished) according to the old Law, *Att 124. P. 7. F. 5.* By which Act, though it be added according to the old Law yet we have no Law, *de falso nummario*, prior to this, except *Att 40. P. 5. F. 3.* which punisheth only the home bringer

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bringers of black money with death. By the *Act 70. P. 9.*
2. M. the home-bringers of false coyns, or lay-money, should
 be dilated, and the dilater is to have the half of all his goods,
 moveable and immoveable, for his revealing: And it seems
 by that *Act*, that it is made treason, for confiscation of Lands
 or moveable Goods, is only in the case of treason; and I find
 no other *Act* that can be the foundation of *Drummonds* con-
 viction as a traitor. *Et de practica*, this Crime hath been di-
 versely punish'd: *Reid* was hang'd for forging false money with
 the Kings Irons, *July 13. 1602.* *Drummond* burnt for forg-
 ing false money, *Novemb. 27. 1601.* And his Brother *Pa-*
rick Drummond burnt also for art and part, red counsel and
 concealing the treasonable forging, coyning, and out-putting
 (for venting is still a Crime, and is designed out-putting in our
 stiles) of false money. *Meinzies* also was hang'd for art and
 part, as said is, *June 30. 1603.* *Thomson* was hang'd and
 forefault for bringing home and out-putting false money, *Ja-*
nuary 19. 1603.
 X. The fourth species of Falshood, is false weights and
 measures, *adulterina statera*, which are punish'd *per l. Corne-*
liam, l. annonam, ff. de extraord. crim. & falsæ mensura, which
 are punish'd *per relegationem, ibid.* With us the using false
 measures or weights of old was punish'd by a Fine, *leg. Burg.*
cap. 52. And the Bailies of the Burghs were declared Judges
 competent thereto, for the first three faults, but the fourth
 was declared to be only punishable by the Justices, because the
 committers life was to be in the Kings will, *cap. 74. ibid.* But
 now such as use false measures or weights deceiving the peo-
 ple, are to be indicted as falsars, *Act 47. P. 4. f. 4.* By which
Act, havers cannot be punish'd, except they use, since the *Act*
 ordains users to be punish'd, and mentions only such as deceive
 the people, which is not done without using: And by the 2.
Act, Parl. 19. Ja. 6. the users of false weights and measures
 are to tyne their hail goods and geir; which punishments de-
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rogats not from the former Act inflicting the punishment of fal-
fit, as hath been debated more fully in the Title of Deforme-
ment: *De practica*, I find that *Brown* was tyn'd for false mea-
sures by the Councils warrand in 100. merks, *pen. July, 1629.*
And that *Porteus* was found guilty, though using was not pro-
ved, since having of false weights in the Shop presumes using,
except this presumption be taken off, as by alledging that the
weights were presently bought, or borrowed, or laid aside, as
light, *May, 1671.*

By the foresaid last Act, the Sheriffs, Lords of Regalities,
and Stewarts, are declared Judges competent to this Crime,
but their Commission there is only tempory for a year, and
therefore it may be concluded that these are not otherwayes
Judges competent to this Crime, else this Commission had
been unnecessary.

The using also a longer Ell or Yard, is also punishable, though
it would appear that here the Merchant himself is only pre-
judged, for he may receive as well as give out by it; nor doth
the Law presume that a man would keep any measure to his
own disadvantage.

I find also that there was a Merchant in *Elgin* pursued be-
fore the Justices, *July ult. 1673.* for false weights, in swa far
as he going to a Mercat, dragg'd his Tobacco after the Boat in
the salt water, which made it weigh more then otherwise it
would have done, and so the people were cheated: But the
dyet was deserted, and though the defender alledg'd that this
was done for keeping the Tobacco from drying too much, and
mouldering into pieces, yet the Magistrats of *Elgin* had tyned
him formerly for the same fault in 20. pound Scots, even for
the ill example, *pana falsi arbitraria tenetur qui in sua merca-
tura addit inutile ut pulverem arenam, &c. aut species aridas
detinet in loco humido Carp. pag. 375.*

XI. Falshood is also committed by assuming a false name,
vid.

vid. Stellionatum, and by presenting one person for another at the subscribing of Papers, *suppositio falsa persona*, which is punished *tanquam partum suppositum*, by the Civil Law. I find one *David Donaldson* hang'd for this imposture, having made use of a false person, who design'd himself to be the person who should by the agreement have subscribed the Assignment, *Decemb. 12. 1611.*

The supposing a false birth, that is to say, the laying in one child for another, is punishable as a false deed, with the punishment of falshood, since thereby men are cheated out of their Estates, *l. ad Corn. de fals.* the words whereof being, *periculum capitis subeat*, is found to extend to death, *Boer. decis. 82.* And the Mid-wite who brought in such a false Child, is punished by death, *Pegner. decis. 80.* But I find that *Rarin.* relates, that *periculum capitis*, was in this case extended no further then scourging: But yet, since this was a great cheat, and doth steal away an Estate from the righteous Heir, and adulterats the off-spring, it ought to be punish'd as severely as theft, especially since it can be committed only by such as being trusted, aggrage their guilt by their unfaithfulness. This crime is called by the *Latins*, *partus suppositus*, and by the *Basilicks*, *η γαταγορία υποβολιμαίου τωκευ*

TITLE XXVIII.

Stellionatus.

1. *The several kinds of Stellionat by the Civil Law.*
2. *What it is, and how punishable by our Law.*

THe heart of man is deceitful above all things, and such as have been conversant in businesse and Courts of Justice, have found that cheats do amongst men multiply, and vary themselves into so many formes, that Legislators were forced to invent this general name of Stellionat; under which they might range all cheats, and thence sprung that maxime, *l. 3. ff. hoc. tit. ubicunque titulus criminis deficit illic stellionatum obijciemus*: Which must be interpret and restricted in its generality, by the preceeding words, *Stellionatum obijci posse his qui dolo quid fecerunt*; So that to infer this crime, it is requisite that there be a cheat or fraud used, and that the cheat want another name, for there are frauds which cannot be comprehended under this Title, as falsifying Writs, counterfeiting Seals. The ordinary species of Stellionat in the Civil Law, are to sell, or impignorat, or to give for payment fraudulently of our debt, these things which belong to others; And to corrupt or change merchandise, which we formerly sold: To exact likewise debt which was formerly payed, and known to be payed, is Stellionat, *l. 29. ff. mandati*, but the craving of it is most Criminal, if receipt of what is craved follow not

upon

upon it. *Bartol. ibid.* And so far is receiving Criminal, that the receiving payment of a debt formerly payed, is Stellionat, though simple craving without receiving will not inter it; but it is most observeable, that fraud is still requisite to the constitution of this crime, and its essence.

II. By our Law we have no expresse statute against Stellionat, except only act 140. P. 20. F. 6. Which bears, that no jury shall be disposed to two lundry persons which is *crimen stellionatus* of the Law; from which Act it is to be observed, that our Law presupposes the Civil Law to be our Law, as to that crime; For it does not determine what is to be accompted Stellionat, or appoint a particular punishment for Stellionat, but only clears declaratorly, that the disposing duties or rents of Lands to several persons, shall be accompted *Stellionatus*; And therefore what ever was punished as Stellionat by the Civil Law, may be punished as such by ours; not only *à pari*, or by extension, but by approbation; the *Roman* Law having by the allowance of that Act become ours; and therefore the making of double assignations or dispositions of Lands, or of any thing else besides Rents mentioned expressly in that Act, is punished as Stellionat in our praetique, which is warranted likewise by the 105. Act, P. 7. F. 5.

By which Act, though Stellionat be not mentioned, yet it is thereby punished, for it is there declared, that whosoever makes double Dispositions of Lands, he shall be called at the Kings instance, and punished at the Kings will. But it may be doubted, why double alienations should be punished as Stellionat, seing *qui rem unam duobus vendit falsi est reus, l. qui duobus, ff. ad l. Corn. de falso*; In answer to which, I conceive, we must distinguish betwixt these who whilst they are selling, being desired to clear, if the thing offered to be sold, hath been formerly sold, or not: say that it was not, In which case he is guilty of a manifest lye, and so of Falshood; But if he only sell one thing twice, without denying that it was former-

ly sold, or was not his own, then he is only guilty of Stellionat, seing though there be a cheat in this case, yet there is no lye: An instance whereof fell out into my own experience, for there being two Writers to the Signet of one name, and money being directed to one of the two, the bearer delivered it to the other, as due by his Master to him, which case was thought by those who consulted it, to be Stellionat, seing though the receiver had not said to the bearer that his Master was his debtor, yet he should not have received the money, for he was obliged to know that the same was not due to him; And yet according to *Farinacius* opinion (who thinks that *dolus in committendo tantum insert stellionatum, sed non dolus in ommittendo*) It might be debated that this case was not Stellionat, seing the receiver of the money was only guilty of omission, in not clearing the bearers mistake: But I differ in this from *Farinacius*, For seing *Dolus in ommittendo*, may be a great cheat in it self, and that the party wronged is as much lesed thereby, I know no reason why the one may not infer stellionat as well as the other: And albeit *dolus in ommittendo*, were not Stellionat, yet this case was, seing the receipt of money sent to another is more then omission.

By that Act *James 5*. It is likewise declared, that Superiors receiving double Resignations, shall be punished as these who grant double Dispositions: And certainly that part of the Act was most just, seing if the Superior was conscious to the design of making these double Resignations, he cannot but be art and part of the cheat of making the double Dispositions, whereupon the Resignation flowed; and so should be equally punished; and in effect, a Superior granting new Inselements, upon divers resignations, to divers persons, does grant double Rights: for to grant a new Right upon the old Vassals Resignation, is to dispen. And seing the buyer is prejudged more by these Resignations, then by these Dispositions, upon which they flowed, (that being a more compleat act then the other

it were unreasonable that the Superior should not be punished as well as the Seller; and yet because it is not presumed, that any would cheat where there is no gain, and that the Superior in receiving resignations, *in favorem*, gains little, therefore this part of the Act is now in *desuetude*.

I find likewise, that other species of Stellionat are punished by our Law, as in *Anno 1634*. *James Clerk* was pursued, because a Sword being sent by *Cuthbertson* to *Moubray* a Sword-apper, *Clerk* did say to the bearer that he was *Moubray*, and so took the Sword, which Libel the Justices would not sustain, to infer falshood, but *tanquam crimen in suo genere*; and yet, *L. 3. ff. ad. L. Cor. de falso assumptio falsi cognominis est crimen falsi*.

The punishment then of this crime could not be certain and determinat, seeing the crime is various in its own nature, but it is arbitrary and punishable at the discretion of the Judge, according to the circumstances and measures of the fraud committed; and it is called Stellionat, from a Serpent called *stellio*, which is beautified by Starry spots, *stellatis guttis distinctum*, and is the most subtle of all Serpents, *plin. lib. 30. nat. histor. cap. 9.*

TITLE XXIX.

Perjury.

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1. *What is Perjury, and the several kinds thereof.*
 2. *Whether he who swears only that he believes what he deposes to be true, be punishable for Perjury.*
 3. *Whether he who promises upon Oath, and performs not, be punishable for Perjury.*
 4. *Whether these who perform not their Parents Oaths, be punishable for Perjury.*
 5. *Whether Witnesses who depone falsely, can be convicted of Perjury, upon the depositions of other Witnesses.*
 6. *Whether a Judge or Advocat violating his Oath, de fide be punishable for Perjury.*
 7. *The punishment of Perjury by the Civil Law, and ours.*

SINCE Witnesses can by their depositions, take away Lives, or ruine the Estates, of such as are the greatest men, or have the greatest Fortunes; the Law which requires that trust in them, doth very justly over-awe them, imposing by the reverend fear of an Oath, and by threatening them with the severe punishment of Perjury, if they swear falsely.

I. Perjury is defined by Lawyers, to be a lie, affirmed judicially upon Oath; but because it is not presumeable, t

any person would both be so mean as to lie, and so wicked as to call God to be a Witness thereto: Therefore Lawyers have very justly delivered us a Brocard, that Perjury is not committed without fraud, *interpretatio facienda est ut evitetur perjurium*; and from this Principle they have deduced, that 1. he who swears that which is false, believing it to be true, is not to be punished as a Perjurer; for in effect he doth not then lie, add *ad Clar. num. 13.* 2. If the Perjury could have prejudged no man, *Clar. num. 11.* because it is not be presumed, that a person would perjure himself, while he could have no design: And from this may be likewise inferred, as a consequence that Perjury should be hardly fastned upon any person, for matters of very small consequence, seing as *de minimis non curat prator*, so it is not presumeable that a man, especially of any integrity or honour, would incurr that guilt, and this was alledged, for Mr. James Row a Minister, when he was pursued for Perjuring himself, by Sir Thomas Stewart, in anno 1667. for the matter of five Pound Scots; but this point was not decided. And albeit I think where this is joyned with other circumstances, which may render the decision dubious, the Council may either mitigat or remit the punishment; yet if the Perjury be clearly proved, I think it should be punished: and in no case should the Justices refuse to put the Pannel to the knowledge of an Assize, because the matter wherein the Perjury is alledged to have been committed, is very small: but it is punishable, if at first it might, though thereafter, *ex eventu*, it proved not prejudicial, as if the writ was improven by a certification; yet the false Witnesses are thereafter punishable, though at the time of the inquiry, that Paper could prejudice no man, because of the certification. It was found in Barclay's case, February 1670. 3. Where the matter is difficult, it is presumed that the swearer did not understand then that he did perjure himself, *Clar. num. 20.* but

but if the swearer did not take pains to understand the matter upon which he was deponing, I think the difficulty should hardly excuse him.

II. It is controverted among the Doctors, if he who swears *per verbum credo, I believe*, can be punished for Perjury. And in Mr. James Row's case, it was alleged, that it should, because in effect all Oaths are but oaths of Credulity, where the matter falls not under sense; and in this case where it was referred to his own Oath, if he was payed of his Stipend, and he deponed upon Oath, he believed he was not payed, *hoc casu*, the word, *believe*, should have inferred Perjury, because he should not have believed except he had certainly known, and belief presupposes a certainty, for faith and belief are all one, so that in effect, to depon, he believed it was payed, was to depon, it was certainly payed, or that in faith it was payed, either of which would have inferred Perjury. But 2. *Perjurium est affirmare quod dubitas arg. L. vinc. ff. nihil nov. apcl. & indiscrete jurare est instar perjurii. Gregor. Tholosan. h. t.* And if the adjecting such a dubious word as this, were sufficient to evite Perjury; that crime should never be incurred, and certainly it is in it self a great undervaluing of the Diety, (*quod est medium inductivum hujus criminis*) to depon without information, where information may be had; and it is very presumable, he would little value perjury; who did value little to get such information, as was requisite for satisfying the Judge, in clearing what was just: And seeing the Law designs by punishing Perjury, to come to the exact knowledge of all privat cases, wherein Judgement is to be given, to the end *judex* may *ubicunque sum tribuere*, it follows necessarily, that it should very severely punish such as depon without previous information; especially where the matter of the deposition is *in facto proprio*, as in this case; for by this rash, or affectate omission, both the Law and the Judge are equally disappointed of their ends, as much as if the

the Deponer had willingly perjured himself. 2. A witness deponing falsely, *per verbum credo*, is in Law punished with the punishment of falsehood. *Bald. Salicet in l. de tut. C. de integrum restitut. Alexander Concis. 28. vel 6. Angel. consil.* 3. The deponing *per verbum credo*, would have gained the deponer the cause; and assoilzied him from the pursuite; and therefore it should inter Perjury against him, because the reason why Perjury is punished, is that there may be something to over-aw such to whom the verity of any cause is referred. 5. It is doubted amongst the Doctors, if he who promises upon Oath in a Bond, to pay a Sum, or perform a deed betwixt and a day, be guilty of Perjury if he failzie, and *Math. de assis. 12.* relates a *Neopolitan* decision, wherein it was found, that Perjury could not be inferred upon the breach of such an Oath as this, the words of the obligation being to pay, *sub fide dal Gentilhomo*, because sayes he, this is *fides* and consequently cannot be punished, but only *pena extraordinaria*, though *Bertrand* be of another opinion, *Consil. 126.*

III. But the question remains yet intire notwithstanding of that decision, whether they who promise under an express, formal, and religious oath, as that by God himself, or Holy Trinity, they shall pay a sum, or do such a deed, betwixt and a perfixed day, may not be pursued for Perjury: and that they should not, may be argued from this, that these being extrajudicial oaths, the Law should not encourage the giving, or exacting of them, so as to punish the not implement of them with Perjury; for this would make every man exact an oath of his debtor when he lent him money, or upon every slight occasion, which were most inconvenient. 2. The Laws do not punish extrajudicial oaths, given in depositions of Witnesses, & sic testes deponens in judicio contrarium ejus quid exit extrajudicium non punitur de falso. *Alexander lib. 1. Consil. 74. Covar. in repit. cap. quantis de puit vid. Monoch de arbitrar.*

arbitrar. Cas. 312. Much lesse should it such extrajudicial promises: Yet some think even such contraventions as these, should, *ob despectum numen*, be punished arbitrary, but if this promise be given judicially, as in *cautione juratoria*, in removings, whereby the party obliges himself to remove, and pay the violent profits, or whereby he binds himself to report the Criminal Letters to the Justice-Clerk, in these & such other cases.

I think the not implement of the promise, unless a reasonable cause can be assigned, should infer Perjury, both because this is a judicial oath, and because in contemplation thereof, the Law remits the necessity of finding another Cautioner, and the Party concerned has no other security nor what is founded upon this juratory caution.

IV. 6. It is doubted among the Doctors, whether these can be accompted perjured, *qui non impleverunt vota parentum juramento confirmata*, who perform and fulfil not their Parents oaths. In which cases *Grotius* distinguishes betwixt those oaths, whereby the Father bound himself only to God, and in these the Son for not implement, is not guilty of Perjury, because in effect, *illud non est onus hereditatis*, but is personal, and so the Son represents not the Father in it, but if the vow were made to a particular person, then that vow being in *unus hereditatis*, the not implement of the Fathers vow, will infer Perjury, for *quo ad* the estate *heres & defunctus sunt una & eadem persona*. *Matheus* distinguishes in this case, *si juramentum parentis sit in rem conceptum & eo casu tenetur sed si non sit in rem conceptum sed in persona tenetur*, arg. l. 7. 8. part. ff. de part. It may be likewise doubted upon the same ground, whether the oath of any people in publick affairs, relating to the State, doth tie their children, & the example of *Saul's* being punished for not observing the oath whereby the people of *Israel* were tyed to the 2. Sam. 21. Seems to evince, that the contravention of these national oaths given by Parents, is punishable upon children, *in foro divino*, but whether the Civil punishment

ishment can be inflicted for contravention of National Oaths, such as the Covenant and Declaration, either in the case where the Oath is given, either by the predecessor, or the giver himself, is not decided. And I should incline to think, that the contravention of these National Oaths, cannot infer the Civil punishment of perjury, both because the design of perjury is only to punish such as do prejudice the privat interest of these, concerning whom they swear, and such a contravention cannot be properly called *mendacium*, the Swearer having designed at that time to fulfil what he Swore, though he thereafter alter his judgement: Nor can *dolus* be alledged in this case, nor that the interest of a third party is thereby prejudged, all which are requisite for inferring Perjury.

V. 7. When witnesses depon with us in any privat case, it was of old doubted, whether the depositions might be repro- bated, and themselves punished for Perjury, by the depositions of other witnesses, and of late these conclusions seem to be regularly allowed. 1. That a witness deponing *verba initialia* falsly, such, as of what age he is, whether he be married, or where he dwels, *eo casu*, he may be punished for perjury, if it he depon falsly, for these questions are proponed, not only to the end it may be known what age the witnesses are of, but likewise to the end it may be known whether the Deponer be a person of such veracity, as may be trusted, and that by these, his veracity may be traced and examined. 2. That a witness may be convinced of Perjury by writ. But 3, whether a witness may be convinced of Falshood and Perjury, by the deposition of other witnesses, was contraverted in the case of *Balkanquel* against *Rig* a Minister, and that he could not, it was urged, because if this were allowed, *daretur progressus in infinitum*, for else if two witnesses deponing that such a thing were done, might be convinced of Perjury, by other two or moe witnesses, these witnesses might again be convict by others, and those by other, *in infinitum*, for the other part, it was alledged,

alleged, that 1. There being nothing to overaw witnesses in *Scotland*, but the fear and hazard of Perjury to free witnesses from this tryal, was in effect to render them *Libertines*, and to encourage them to depon falsely. 2. It was absurd to think, that if two witnesses should depon that which were notoriously false, as that such a man was killed, who thereafter was seen by a whole Judicatory, and all the members of Session and Parliament, to have been alive, that *eo casu*, witnesses should not be found guilty of Perjury. 3. Assizeis who are in effect Witnesses, as well as Judges, and may proceed to a Sentence upon their own privat knowledge, may be tryed by an Assize of error consisting of twice as many; Whereas, if the depositions of witnesses could not be reprobated by other witnesses, no Assize could be convict by an assize of error, as *temere jurantes super assiza*. To the foresaid argument it is answered, that 1. The same did only evince the probation, should be more exact in that then in other cases, but did not at all conclude, that such witnesses could no wise be convinced of Perjury; and the ordinary rule given by Lawyers, is, that twice as many are requisite to reprobate, as to prove: Which conclusion could not take place, if the reprobation of witnesses by witnesses were not sustained. 2. This argument would evince, if it had any weight, that even, *circa initialia*, witnesses perjuring themselves, could not be pursued for perjury, because these might be convinced by other witnesses, and these by others, & sic daretur progressus in infinitum, so that either witnesses cannot be convict of Perjury in no case, or else they may be in every case, where they swear falsely: Notwithstanding all which the Justices by Interloquutor found, that witnesses could not be pursued for Perjury, upon the deposition of other witnesses, upon the day of 1677. but yet it remains doubtful, whether one witness may not be pursued for Perjury, upon the deposition of others, though two cannot, because the joynt depositions only make a full probation,

8. *Clarus, num. 12. §. perjurium*, is of opinion, that when any thing is referred to Oath judicially, that *eo casu*, the party who swears, can never be challenged for Perjury, *sed Joh. deum habet ultorem*, which *Boerius* doth also assert to be the common opinion, *decis. 305.* And the reason which moves them to this, seems to be, that a party having made his Antagonist absolutely Judge of his own cause, he has, as it were, submitted to him, & *juramentum debet esse ultimum refugium*, and this seems to be the case decided, *per. l. 2. C. de rebus credit : religionem contemptam juramenti satis deum habet ultorem sed majestatis crimen vel periculum corporis & si per principis venerationem quodam calore fuerit perjeratum, inferri non placet*, for in the immediately preceeding Law, it is said, that *causa jure jurando ex consensu utriusque partis delato decisa, nec perjurii pretextu retractari potest*, so that adding both Laws together, the sense is, that when the cause is referred to any Parties Oath, it being decided conform thereto, that Decision can neither be retracted upon pretext of Perjury, nor can the Perjurer be corporally punished. And this seems a much more reasonable answer, than those many given by the Doctors; but yet I cannot assent to the conclusion it self: nor is it at all conform to our Law, nor perhaps to reason; for interest and avarice are sufficient baits to Perjury, though impunity be not thereto added, and when the Party defers an Oath, he intends thereby to submit finally to him, to whom the samine is deferred; but not so, but that if thereafter the swearer shall be found Perjured, he may be still challenged: Nor herhaps would he have deferred the Oath, if he had not concluded himself secure, as to what should be deponed, not only out of respect to Religion, but likewise because of the hazard of Perjury; and seing in this case, there is *mendacium juramento affirmatum*, I do not see how it should not be Perjury: Is there any ground why at least His Majestie's Advocat should not be allowed to pursue it,

for the reason which is urged for the speciality in it, ceaseth in him. And as there is no Decision in favours of *Clarus* his opinion in our Law, so in Mr. *James Row's*, and other cases, where this might have been proponed, this defence was never proponed; yet in some cases, the deponer, *in iuramento delato*, craves that the Lords may declare, that he shall not be liable for Perjury, when any Oath is necessarily so deferred to him, which the Lords in some cases use to grant, as *in facto antiquo*: And by so doing, they show that Perjury is punishable, *regulariter*, even in him to whom an Oath is deferred: but I believe, that the Doctors have more justly concluded, that where an Oath is deferred in Criminals, though the Pannel needs not swear, yet if he do swear, he is not punishable as a perjured person, though he swear falsely, *quia licet cuique sum redimere sanguinem*, *Clar. num. 12.* And yet it may be debated, that this holds not with us in Usury, and other cases, because there the Law obliged him to give his Oath; and *Mathews* doth think, that it should in no case, but rather that the Perjurer should there be punished with a double punishment, both for concealing the Crime, and also Perjuring himself. And it may be alledged that this is rather punishable then ordinary Perjury, because the Defender needed not swear, and was in no hazard by not swearing, and the less the temptation be, the sin is alwayes the greater: nor needed the Defender redeem his own Blood by swearing, as is pretended, or at least, *licet hoc liceat, licere tam debet per modum licitum, sed non perjurio.*

V I. It may likewise be doubted in some cases, whether the violation of an Oath doth infer Perjury, as when a Judge gives his Oath that he shall administrat Justice impartially, or an Advocat that he shall be honest in his employment, without discovering his Clients secret, or betraying his business, if that Judge, taking Money as a bribe, or that Advocat thereafter prevaricating, may be upon these accompts pursued for

Perjury. And this was, I remember, controverted in the case of one of His Majesty's Officers of State, who was pursued upon the foresaid *Act* of Queen Mary, for Perjury; because he was alledged to have taken Money from the defendants, in cases wherein they were pursued at His Majesty's instance; and that this could not infer Perjury, was argued from this, that our Law having made some particular Statutes, as to Perjury, it designed thereby, that the Subjects of this Nation, should not in this Crime be left to the common Law; and seeing it had only punished Perjury in the case of Witnesses, Affizers, and Bigamy; it did clearly follow, that Perjury *deum tantum habet ultorem*, in all other cases. 2. If Perjury were punishable in this case, Tutors and Executors who find caution, might be always punished for Perjury, where they are pursuable for Mal-administration, which were absurd, and was never practized in any Nation. 3. When such Oaths as these are given, these words, *As ye shall answer to God*, are ordinarily adjected, rather to expresse a fear of the Deity upon the swearer, than to subject him by the Oath to the hazard of Perjury: - and the fear of Perjury is neither thought upon considered by the Administrator, nor the swearer, so that *non de hoc agitur*, at that time, which is one of the many things, that is always looked upon in punishing of Crimes. 4. If consequential Perjury had been punishable as formal Perjury, there needed no *Act* to have been made, declaring that Bigamy should be reputed, and punished as Perjury, seeing it was such by consequence before that *Act*. For the better clearing of this case, it will be fit to divide Perjury in Formal and Consequential Perjury: and to conclude that formal Perjury, which is in these cases declared Perjury by an expresse *Act*, should be punishable as a Crime; that that consequential Perjury, as may be instanced in the cases above-written, should not be punished as a Crime, but as an Aggravation: for seeing in these the Perjurer did not

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formally design to commit Perjury, it were not very rational to think, that he should be punished by the formal punishment of that Crime: which distinction, I find likewise allowed by the Civilians; for albeit formal Perjury was only punishable by Banishment, and Infamy: Yet if any man died by that Perjury, as in false-witnessing in capital Crimes, the Perjury was *eo casu*, punishable by death; and if it was mixt with Treason, it was punishable as Treason.

Margaret Wood was in *February 1631.* pursued, for having perjured her self as a false Witness, in so far, as she having been cited before the Privy Council, and examined by them, she had deponed many false things against the Laird of *Putcaph* and *Richard Mowat*: Against which pursuit, it was alledged for her, 1. That she could not be pursued as a false Witness because a Woman in our Law cannot be a Witness, and consequently she cannot be a false Witness. 2. She did not depone upon oath before the Council, and consequently she cannot be guilty of Perjury, since, *nemo sine juramento est perjurii reus*; Nor is a person deposing for the information of the Council, obliged before an oath be administrat, to confide what she is deposing, as lyable to the certification of Perjury and if it were otherways, there needed no oath be administrat so that before the administration of an oath, the deponer being neither a witness, nor sworn, can neither be guilty of perjury, nor false witnessing: much less can she be guilty of perjury, in having deponed falsely, which is a complicated crime made up of perjury and falshood. 3. She is but one single witness, and so could not have prejudged by her testimony, the persons against whom she deponed, & *semper perpendendum est damnum, quod ex perjurio resultat*, *Carpz. quest. 46. n. 47.* Likeas, here she retracted her own deposition her self, before any pursuit was, or could be intended against those Gentlemen and that she deponed was the result of the confusion she was

put in, by her appearance before the Council, being a young Girl, not exceeding 18. so that her age and sex should excuse her, *si quis calore iracundia, aut forte lingua lapsus, aut precipitatus, perjurium commisit, ei eo casu ignoscere debet, Rensf. lib. 3. decis. 2.* And there is nothing more natural, or less dangerous, then that a guilt arising from a deposition, and meer words should be taken off in the same way, especially, before any person be thereby prejudg'd, as in this case. 4. This Libel could not be warrantably founded upon the Act of Q. M. which punish'd only perjury committed in marrying two wives, but no other species of perjury. To which it was answered, that as to the first defence, it was not relevant, since she being cited before the Council, ought to have depon'd truly, even in informing the Supreme Judicatory of the Nation, who use, and must examine women for the good of the Commonwealth: especially in such atrocious and occult crimes, as in the burning of the House of *Frendraught*. And though the defender may in some cases cast a woman from being witness, yet that excuses her not if she be examined. To the 2. Lawyers are clear, that a witness may depon without being sworn, or the swearing them is not essential, since the pursuer may retract it: And yet the witness who depones falsely, even though not sworn, is a false witness, *Bart. in l. si quis ff. ad l. Cornel. fals. Clar. b. t. num. 11.* To the 3. it was not relevant, since she inform'd against these Gentlemen in a treasonable point, and might have prejudg'd them: nor did her retraction proceed from repentance, but confrontation; nor did she accidentally only, or by confusion lapse into this error, she having spread these misreports before she was cited, and having reiterated her confession after citation. To the 4. the practice of the Kingdom was oppon'd, which is the best interpreter of laws. And in Anno 1615. *Grahame of Long-boddum*, and Anno 1622. *Turnbul of Belshes*, and lately *Dempster of Muresk*, were punish'd with death for deponing falsely, or seducing

ducing others to depon. But these points were not decided.

VII. The punishment of Perjury by the Civil Law, was Banishment, *l. ult. ff. de crimine Stellionatus & fustigatio*, or Scourging, *l. si duo §. si quis perjuraverit*. By our Law, *Act 19. Parl. 5. 2. Mary*, Bigamy is declared punishable at Perjury, which is declared to be confiscation of all their moveable Goods, warding of their Person for year and day, and longer during the Kings will, and that as infamous persons they shall never be able to bruike Office, Honour, Dignity, nor Benefice in time coming. As to which Act, it is observable, 1. That Perjury is not formally punishable with us, but only declaratorily Perjury being in it self so heinous a Crime, but the reason of this seems to be, that Perjury was before this Act punishable, after this manner, for by the *4. cap. lib. 1. Reg. Maj.* it was appointed, that *temere jurantes super assis spoliabuntur mobilibus & in carcerem detrudentur per annum & diem ad minus & infamia notam incurrant & amittent legem terræ*, which Skeen interprets to be, *non habere personam standi in judicio*, and not to be receivable as witnesses, either in *judicio*, or *extrajudicium*, which Act is likewise ratified, by the *47. Act, Parl. 6. K. F. 3.* where it is said, that wilful or ignorant Assizers, Man-swearers shall be punished after the Kings old Law, in the first Book of the *Majestie*.

Where Perjury is to be inferred from a Deposition, either as Party or witness, it is necessary, that the Deposition be subscribed by him; and the Lords found that Mr. *Fame Row* could not be convicted of Perjury, upon his Deposition subscribed by the Clerk.

Sometimes the Council change the punishment of Perjury into banishment; as in the case of *Galbraith*, who came in wall for Perjury. 23. July. 1625.

TITLE

TITLE XXX.

Of Injuries, Personal, and Real;
And of infamous Libels.

1. *Injuries are either verbal or real.*
2. *The requisits in Libelling verbal injuries.*
3. *What are real injuries.*
4. *Who are Judges to verbal or real injuries.*
5. *Infamous Libels, how punished.*
6. *Leasing-makers, how punished by our Law.*

I Have oftimes thought that men should walk legally, not only in obedience, but gratitude to Law, since the Law takes so much pains to secure not only our lives and estates, but even our honour and reputation, and will humour us so far, as that because we will think railery a misfortune, it will therefore punish even these who offend our imagination.

I. Injury then, in its more comprehensive sense, may give a name to all crimes; for all crimes are injuries, but injury as it is the Subject of this Title, is the same thing with contumely or reproach: It is divided by Lawyers, into such as are committed by thoughts, deeds, words, and gestures; but the more received division is, that injuries are either verbal, or real.

II. Verbal injuries are these which are committed by un-

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warrantable expressions, as to call a man a cheat, or a woman a whore; but because expressions vary according to the intention of the speaker, therefore except the words can allow of no good sense, as Whore, or Thief, or that there ly strong presumptions against the speaker, the *injuriandi animus*, the designe of injuring, as well as the injuring words, must be proved, and the speaker will be allowed to purge his guilt, by declaring his intention, *l. 5. §. octavo, ff. de injur.* and his declaration will, without an oath, be sufficient, except the offender be burdened with contrary presumptions, *Berlich, conclus. 60. num. 18.* Lawyers therefore require in Libelling injuries, 1. That the particular expressions be distinctly condescended upon; nor is the general, you called me a Cheat, or said some such thing sufficient, seing not only words but even the pointing of them does alter the estimat of Injuries, 2. The pursuer should Libel the design of injuring, except the words inter so clearly an Injury, that there is no necessity to Libel the design, 3. That the pursuer who was injured, did presently resent the injury, and took what was spoke for an Injury, which the Lawyers call *revocatio injuria ad animum*, And it is sufficient, that this dissatisfaction be signified either openly and expressly, or by some other Acts which testified discontent, *ex incontinenti quis injuriam debet ad animum revocare alias ex intervallo nihil facit sed injuria remissa censetur. §. ult. jst. de injur.* And the reason of this seems to be, because the essence of a verbal injury consists in dissatisfying the person to whom the words were spoken, and words are only Injuries, if they be so taken, and therefore if they were taken at first to be no injury, they were then no injury: And if they were not then an injury, they could not afterwards become such.

Since then Injuries are estimat according to the design of the offender, it follows naturally, that men who are Fools, Idiots, very young, or very drunk, are not punishable for verbal Injuries, except the offender did become drunk upon design to offend,

offend, *si non ex proposito sed ex impetu deliquit*. And great passions which break off all designing, *justa & non affectata ira* excuses also in this case. As also for the same reason, the objecting true Crimes are no injury, if the objecter designed principally not to offend the person guilty, but to inform the Common-wealth, or to defend the speakers own honour. And upon the first accompt, it was found, that the detecting what the Common-wealth was not much concerned in, was an injury, *Cravet. consil. 145*. And upon the last accompt, it is thought, that to give a man the lye, is an injury, but that it is no injury to say you speak not truth; for in the one we defend our own honour, but in the other we offend the honour of the speaker: and custom has made the expression passe for an expression to be used when we design to offend. The relating likewise what we heard from good Authors, who designed no prejudice, is sufficient also to defend against the punishment due to Injurers, as was found in the Court of *Savoy Cod. fab. de injur. def. 5*. Yet sometimes injuries are inferred not only from expresse words, but even from the presumptive meaning of the speakers; as to look in a mans face, and to say, I am not a lyar as others are, *Afflict. 5. injuria. tit. de parjur. firm.* or to say, flauntingly, you are a fine Church-man, *Jacob. de bello vi. lib. 1. cap. 3. num. 31*.

III. Real Injuries are committed, by hindring a man to use what is his own, by removing his Seat out of its place in the Church, by giving a man medicaments which may affront him, by Arresting his goods unjustly, by wearing in contempt what belongs to another man, as a mark of honour, by Razing shamefully a mans hair, or beard, by offering to strike him in publick, or by striking him, or riving or abusing his cloaths, or his house, and many other wayes related by *Berlich. conclus. 69*.

VI. According to our Law, verbal injuries, are punished only by the Commissars, who are *judices christianitatis*: Scän-

dal being a Church censure, And the Commissars do inflict pecuniary mulcts, and make the offender do penance at Church doors, or otherwayes: nor do ordinarily the Lords of Session either Advocat such Actions, or modify their penalties.

The Council do use to remit to the Commissars such pursuits, and refuse to try verbal injuries done to privat persons, as in the case of *Strauchan* and *Straiton*; but if the verbal injury was done to a Magistrat, as if any man should call him a knave, or a fool, then the Council use to fyne and to punish even verbal injuries, as in the case of *George Campbel*, and the Bailiffs of *Inverary*, 1666. Or to a Privy Counsellour, as in the case of Mr. *Alexander Spotswood* and the Justice Clerk. And though verbal injuries are extinguished by the Civil Law, if they be not pursued within a Year, or by posterior friendship; so the Law is most desirous to pass by such imaginary Crimes, yet in *George Campbels* case, a subsequent reconciliation was not sustained as a relevant exception, because it was not very expresse, they punish also *scandalum magnatum*.

The Criminal Courts likewise punishes verbal injuries, if against Magistrats, but will not sustain a pursuite against private persons, for though 11. of November, 1672. *Aikman* against *Carnegy*; nor would they sustain a Criminal pursuit, for calling a Minister perjured, *vid Stock. decis.* 108. where he tells us that it is the present custom of *Brabant* not to sustain Criminal Actions for words, except they be spoken against Magistrats in the exercise of their employment, *vid. l. ult. ff. de priv. delict.*

Real Injuries may be pursued before the Council, or Justice Court, and the punishment is arbitrary.

V. Infamous Libels, *libelli famosi*, are the most permanent of all Injuries, and therefore are most severely punished; and in it the offender, shews more design, and therefore is more guilty.

He who writes, dictats, or affixes infamous Libels, or causes writ, dictat, or affix them, is punishable.

He who finds an infamous Libel, and shews it, though to one only, is punishable, if malice or design can be proved, else not; for there is nothing more ordinary, nor more innocently done for the most part, then to shew such Libels: whether *dolus malus & animus iniuriandi*, (a design to offend,) be presumed in this delict, or must be proved, is much contraverted, *Bertaz. consil.* 237. affirms that it is presumed. *Farin. quest.* 295. affirms it is not presumed, but must be proved. And I incline to this last opinion, seeing infamous Libels are not now so much resented as formerly, custom having much allayed the pique which used to ensue thereupon, and that custom defends from all guilt in this case, is most learnedly maintained by *Coler. decis.* 154. where it was found that Stationers were absolved, though they sold infamous Libels, because all Stationers use to sell such.

Many things do likewise in this case lessen the punishment; as that the Pannel is a minor, was provoked, did tear it before it was fully written, or after it was affixt, or confest his fault, and said he did it only out of passion, or curiosity, or if what was said was true, *Berlich. conclus.* 67.

The punishment of this delict was of old arbitrary; *Paul. lib.* 1. *sent. tit.* 14. but was made capital by the edict, *valentiniani & valentis-l. unic. C. de famos. libel.* but *Clar.* makes it arbitrary by the present custom of *Europ*; And so it is with us at present in *Scotland*, except where the Prince is abused, or where a capital Crime is alledged against any man, for *eo casu*, infamous Libels are justly punishable by death: And thus *Heeming* was hanged for saying that he wisht that the King would shoot to dead and dye of the falling Sicknesse, 17. May, 1615. but in this the words were maliciously spoken, for the speaker uttered them because he had lost a Plea. But sometimes the speaker is only Scourged and Banished, as *Tweedy*

was 13. *March*, 1612. for abusing Constables and bidding the King, the Council, and them, kiss his arse, and swearing he cared not a fart for them, which words appeared both by the speaker, and the contexture of the words; to have rather stood from folly, then design. And *Spotswood* in his History, relates, that the School-master of *Edinburgh* was hanged for dispersing Libels against the Regent, wherein he charged him with being guilty of capital Crimes.

Leasing makers.

VI. Like to this Crime, if not the same with it, is Leasing making, whereby hatred and discord may be raised betwixt the King and his people, which was punished with tinsel of life and goods, by the 43. *Act, Parliament 2. King James the 1.* Like as any misrepresentation (or evil information, as our Law calls it) of the King to his people, is punishable in the same way, by the 83. *Act, Parliament 6. King James the 5.* And though the slandering of His Majesty might have been punished, by the reason of the first Act, yet we see that our Predecessors did not think *paritas rationis* sufficient in punishing Crimes; Upon which Acts a great person was found guilty of death, for writing a Letter, wherein the Parliament was slandered, *Anno 1662.* But this was there after rescinded by his Majesty. Like as by the 20. *A. of the 4. P. K. F. 6.* the hearing and not revealing, and not apprehending of such Leasing makers, if it be in the hearers power, is equally punished with the Leasing making; but because these Acts could not reach to slandersers of His Majesty to His people in *England*, or misrepresenting them to the King, or abusing any Privy Counsellor of that Kingdom, therefore the misrepresenting them is declared punishable at His Majesties pleasure, by the 9. *Act, 20. Par. K. Ja. 6.* By the same last Act, dispersing or making Cockalands, or other infamous Libels against Counsellors of *England*, is punished as Leasing making.

TITLE XXXI.

Poinding of Oxen, in time of
labouring.

How this Crime is punished by our Law.

How by the Civil Law.

The explication of our Act of Parliament in this case.

How the Civil Law and ours differs in this point.

BY the 98. *Act 6. Parl. Ja. 4.* it is Statute, that no Sheriff, or Officer, shall poind, or distreinzie the Oxen, Horse, or other goods, pertaining to the Plough, and that labours the ground, the time of the labouring of the same, where any other Goods, or Lands are to be Apprized, or poinded, according to the Common Law.

II. The Common Law, to which this relates, is l. 8. *quæ res pig. oblig. possunt, pignorum gratia aliquid quod ad culturam agri pertinet auferri non convenit*, and by the subsequent, *ibid. agriculiores terrarum securi sunt, ita ut nullus iniuriatur tam audax, ut personas boves & agrorum instrumenta si quid aliud, quod ad agrorum rusticorum operam pertineat, auferre aut capere presumat: & si quis hoc statutum violare præsumserit, in quadruplum ablata restituat & infamia notam impio iure iucurrat, imperiali animadversione nihilominus puniendus*.

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du, and *Maranta de ordine jud. part. 6. Act 3. num. 31.* relates, that this Law is confirmed in *Sicilie*, by an expresse Statute; and all these Laws seem to be founded, on *Deut. 24. vers. 6. No man shall take the upper nor nether millstone to pledge: for he taketh a mans life to pledge.* *μυλον η επιμυλον*, as *Grotius* observes, out of *Philo.* which are called *mola & catillus*, *l. cum de lanionis S. idem consultus. ff. de instru. vel instrumento legato.*

III. By the foresaid Act of Parliament, the Poinding of such Goods is forbid, in the time of labouring, but it is not declared to be a Crime; and the Lord *Renton* haveing, in *January 1666.* pursued the Officer of the Court of *Coldinghame*, for poinding one of his Plough Oxen, when they were labouring, before the Criminal Court, it was alleged that no criminal pursuit, could be founded upon this Act, seing nothing could be criminally pursued, but that which was made a Crime, by a special Statute, and to which a special sanction was annex'd. Likeas by the constant custome, many actions of Spoilzie were founded upon this Act; but no criminal pursuit was ever thereupon intended: To which it was replied, that the contempt of a Law, was in it self a Crime, seing disobedience to Authority, was in effect the basis of all Crimes. 2. Illegal intrometting with another mans Goods, was a Crime, especially *ubi lex non solum non assistebat, sed & resistebat*, for theft is nothing else but an unwarrantable intromission, and as the taking of His Majesties free Liegdes is a Crime, where the same is not warranted by Law; so the poinding of these Goods should infer a Crime that being another species of unlawful execution. 3. This Act discharges such executions, conform to the Common Law. And by the Common or Civil Law, this is a Crime as is clear by the Law above cited; and whereas, it was alleged that no sanction was annex'd: It was replied, that where the Law annexes no sanction, the punishment is there

arbitrary; and there are many Crimes, both in the Civil Law and ours, to which no sanction is annext. The Justices sustain'd the Label, and ordained the Pannel to go to the knowledge of an Inquest: The expresse words of the Interlocutor were, that the poinding an Oxe, in the time of labouring, is an injury and wrong, punishable by the Law, *pena applicanda fisco*. And thereafter, the three Pannels were found guilty, though it was not expressly proved, that the Oxe was labouring actually, the time of the poinding, but only that he used to labour, and was in the Plough the week before, and the Countrey was then labouring, all which are necessary qualifications of this Crime, and so are necessary interrogators after pronouncing of which doom, the Justices fined each of the three Pannels, in fourty Pound Scots. And yet in June 1674. a reply against lawfully poinded, being proponed in a pursuit for theft, the case was by the Justices referred, to be first civilly pursued. It was here also alledged, that by the 34. Act. 4. Parl. 5. where Crimes may be criminal-ly, and civilly pursued, the civil pursuit ought first to be discus'd, which was repelled, because, though a civil pursuit of spoilzie were intended, there could no defence, such as lawfully poinded, *authore pratore*, &c. which are usual in other cases, be proponed here, seeing though the executions were formal, and the Decreet whereupon they proceeded irreducible, yet to poind a labouring Oxe, in labouring time, is in all cases unlawtul, & *inaccessat hoc casu ratio legis*. 2. The defender could not plead the benefite of this Act, except he first acknowledged, that the wrong here committed was a Crime, for the Act runs only in such cases, as may be civilly, or criminally pursued.

IV. It is observable, that albeit this Act relate to the Common Law, yet they differ in many points, as 1. The persons of labourers could not be apprehended by that Law, but by ours they may. 2. By that Law no distinction is

made, whether there were other poindable Goods or not; but by ours, these particulars may be poinded, or Lands may be appriz'd; and therefore such as raise Criminal Letters upon this Act, should libel, that such Goods were poinded in labouring time, and that the owner, or debtor had other Goods and Lands, against which the creditor could have had execution: Albeit I think, he is not obliged to prove this; but that this is, *ex eorum numero qua allegari sed non probari debent*, yet if the Messengers execution be produced, bearing, that he searched, and could find no other Moveables, I think, that *eo casu*, the Messengers execution should make Faith, except the pursuer offer instantly, to condescend upon these other Moveables, that were extant, and be ready to prove the same. I find, that if the Messengers executions bearing in an Apprizng, that he searched, but could find no Moveables, they are so far believed, that no contrary Probation will be received, for else all Comprizngs might be reduced: yet I think, that the case is not alike here, for the Act being so expresse, it should be sufficient to defend against a crime, (though not to reduce a real diligence,) that other Moveables were extant.

Under the prohibition of this Act, are comprehended, not only the Goods that are in the Plough, but these Horses which lead foggage, for without these, Land cannot be laboured; and so the reason of the Law extends to them likewise, the Act of Parliament expresses separatly, and distinctly, Goods pertaining to the Plough, and that labouring the ground: nor are these words *that labours the ground*; exceptive only.

By these words, *in time of labouring*, are mean'd, not only when the beasts are actually labouring, but the season of labouring, and that from the time of striking, to upseed time; and therefore Goods that had once tilled, though

Poinding of Oxen.

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in *October*, seem not poindable, for then labouring is as
necessar as in the *Spring*; and yet the contrary was found,
the 15. of *November*, 1627. and the 22. of *November*,
1628. because as is there alledged by *Durie*, *October* is not
the season of labouring.

It may be doubted, whether Horse leading foggage in *June*
and *July*, can be poinded, for that is the season of that kind
of labouring.

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TITLE XXXII.

Bearing of unlawful Weapons.

1. *What is the punishment of this Crime by our Law.*
2. *What by the Civil Law.*
3. *Who are Judges competent to it.*

BEaring of Hagbuts, Pistols, and other Fire-works, were punished of old by amputation of the right hand, but by the 6. *Act, Parliament 16. Ja. 6.* the bearing of such weapons is forbidden, though no prejudice be done by the wearers, who may be pursued, either before the Council, or Justice Court, and the punishment by the Council is declared not to be corporal, but only confiscation of their moveables, or synning and imprisonment; but prejudice of any pursuite before the Justice Court, who it appears may inflict the former punishment of cutting off the right hand.

It would seem that by this act the Pannel is obliged to give his oath before the Justices, which is not usual in any crime, except that of Usury, for the probation by oath is indefinitely subjoynd to pursuits before the Justices or Council, And albeit the Council does immediatly preceed, yet that probation by oath seems not to relate solely to the procedure before the Council, For when the procedure before the Council is repeated, the probation by witnesses is only there mentioned,

Yet

Yet I think there is an error in the printing of this Act, for it is very unreasonable, that when this Crime is proved before the Council by witnesses, that no amputation shall be remitted, and yet this privilege should not be extended to those against whom it is proved by their own oath.

It is observable from this Act, that the Council may force such as are pursued before them to give their oaths, albeit it may be alledged, that *nemo tenetur crimen contra se probare*.

By this Act likewise, all licences to bear their Weapons reordained to be past in Council, and to pay a composition to the Thesaurer, and to passe his Register and all the Seals, else to be null.

II. By the Civil Law, the bearing of these Weapons was crime also. *l. 11. C. ut armorum usus* - and by the Feudal Law, c. 1. *S. si quis. de pace tenenda. & tenebatur pana legis* *alia de vi publica*, which was arbitrary: And the Glosse observes, that the carrying of such Arms was repute publick violence, though no prejudice was done, which is consonant to the Act of Parliament. But it is strange that only Fire-works, or ingines should be forbidden by that Act. Nor can the carrying Pikes, Swords, or any other weapons, be punished by that Act.

By the Civil Law likewise, the prohibit Arms were confiscated, and *Marfil. in prac. §. pro complemento, N. 12. Carens & Clar.* declared, that by the custom both of Spain and other places, the Arms are confiscated, albeit there be no express warrant for that confiscation by the Statute, but it may be doubted if the true owner having lent them without being conscious to the crime, will lose them, and I think, not.

But keeping of such Weapons at home is not punishable either by the foresaid Act, nor common Law, by which likewise it is lawful for such as travel to bear such Weapons, for their own preservation, & *generaliter licet portare arma defensiva*.

sua; but our Law allows no such distinction. And I remember that *John Macknaughton*, being pursued before the Council for bearing forbidden Weapons, they repelled this defence, *viz.* that he was travelling (unlesse the journey could have been alledged necessary, for else the Act might still be eluded) and that it was the custom of the *Highlands* to go still well attended and armed, which defence seemed to some ill repelled, for self-defence, and the custom of the Countrey, excuses still from this crime, *Farinac. de diver. crim. questi.* 108.

By the common Law, offensive Arms, such as Swords and Pistols, were forbidden, and the bearers punished, albeit no prejudice followed; but the carrying Stones and Trees, and such other things as were not, *ex sua natura offensiva*, was only punishable, if violence was done by the bearers, *l. armorum de verb. sig.*

II.I. This pursuit is more ordinarily before the Council than the Justice Court, and is ordinary Libelled as an aggravation, rather than a crime. Thus I find *William Hamilton* pursued for wearing of Pistols, and presenting one to the Provost of *Edinburgh*, whereupon he came in will, and was banished the Realm during his lifetime, 1. *Novem.* 1597.

The prosecution of this crime concerns only his Majesty's interest. And therefore the dyet was deserted, because His Majesty's Advocat, nor none to represent him, did not concur, nor was the Libel raised at his instance, 20. *July*, 1596. *James Leask*, against *Andrew Red.*

TITLE XXXIII.

Beggars and Vagabonds.

1. *How Beggars and Vagabonds are to be punished by our Law.*
 2. *How by the Civil Law.*

Our Law hath been so charitable, as to provide for Beggars, by special Statutes, *Fa. 1. Parl. 1. cap. 25. Fa. 1. Parl. 1. cap. 42. Fa. 4. P. 6. Parl. cap. 70. Fa. 5. Parl. 4. cap. 21.* But sturdy Beggars (our Law calls them *Egyptians* sometimes, as the *French* calls them *Bohemians*) and Vagabonds should be proceeded against by the Sheriffs, and other Judges, and they may exact caution of them, and if they find none, they should be denounced fugitives, *Fa. 6. Parl. 1. cap. 97.* and may be sent to publick Work-houses, or put in the Stocks, *Fa. 6. Parl. 12. cap. 124. 144. and 147. Item. Fa. 6. Parl. 15. cap. 268.* and if they be receipt after they are denounced fugitives, their receptors are lyable for the prejudice sustained, and the parties damnified, will have action against the Magistrates, within whose bounds or jurisdiction these Vagabounds are receipt wittingly, *Fa. 6. Parl. 11. cap. 97.* But this Act determines not, whether this *wittingly* relates to the receptor, or Magistrat; yet by the common Law, the adverb *scienter*, is still applicable to the person, against whom the penal Statute runs; so that except the Magistrat know that

that the Vagabond was harboured within his bounds, it were severe to sustain action of damage and interest against him, though the receptor knew the Vagabond, and did wittingly receipt him. But I think, that if the Magistrate did either omit his duty, he will be liable, *nam scire & scire debere equi parantur*, or if he was willingly ignorant.

I find that *A. B.* — being pursued criminally, for general receiving Vagabonds, this action was not sustained, but he was referred to the Kirk Session, which it seems was done, because of the 147. *Act, Parl. 12. Ja. 6.* whereby Ministers, Elders and Deacons, may nominate any two of their number, to enquire into this crime, and whom His Majesty makes, and constitutes Justices as to that effect. It appears by a Proclamation, emitted by the Council, in *Anno 1603.* these Egyptians were ordered to leave the Kingdom, upon pain of death, which is ratified by the 13. *Act Parl. 20. Ja. 6.* and upon that Act of Parliament, *Moses Sham* and other Egyptians, Sorners and Vagabonds, were hanged the last of July, 1611.

II. Our Law has in this, followed exactly, the Civil, for there is a title in the *Codex, de mendicantibus validis*, our sturdy Beggars: and the *nov: l. 80.* this Crime was also called by the Athenians, *αργα*, *sive otii ignavi de quo vide hegium, l. 2. quest. 27.*

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TITLE XXXIV.

Robbery, Oppression, *vis publica & privata.*

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1. *The several Epithets given to Robbery, and how it is distinguished from other Crimes.*
 2. *Common Theft, and Stouthrief, how punished by our Law.*
 3. *Several decisions, as to this Crime.*
 4. *How the assisting of Robbers is punished by our Law.*
 5. *In what cases is it lawful to joyn against Robbers.*
 6. *The punishment of oppression by our Law.*
 7. *In what cases the civil right is to be discussed, before the violence can be criminally punished.*
 8. *How Oppression was termed by the Civil Law, and how it was thereby punished.*
 9. *What Concussion is, and how punished.*
 10. *Black mail how punished.*

MEn may by dilligence and circumspection, defend themselves against Theft, and these who steal clandestinely, shew a reverence, even to that Law which they transgress; but Robbery and Oppression are Crimes, against which there can be no fence: and in which, these who violate the Law, contemn the Legislators. To defend them against these, men did associat themselves under Government, and

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renounced their native liberty, for the protection of Law: nor can Law justify the severity of its punishments, and the great exactions it requires, but by returning to these it commands, a sweet and pleasant security, against all rapine and violence.

I. When Theft is aggravated by violence, it is called Robbery, from the *Germane* word *Raube*; and is with us called Stouthrieff, Stouth signifying Theft, and Rieff signifying violence: In which Crime, our Persons are endangered as well as our Estates, and so is ordinarily punished by death, even in these Countreys, where Theft is only punishable by pecunial mulcts, or whipping, and thus it was punished with death amongst the Jews, as is clear, by *Dauids* answer to *Nathans* Parable, though Theft was only punished by restitution; and though *Calistratus*, l. 28. *S. grassatores*, ff. de *panis*, seems to make such only punishable, if they Robb frequently, and in high wayes, and with Arms, *grassatores qui praeda causa id faciunt proximi latronibus habentur; & si cum ferro aggredi & spoliare instituerunt capite puniuntur. Utiq; si sapius atq; in itineribus hoc admiserunt ceteri in metallum dantur, aut in insulas relegantur.* Yet by the custome of all Nations, Robbery is punished with death, though it be not reiterated; and I think, that Law must be only understood of such, as designed to Robb, *qui instituerunt*, who are punishable, though they actually Robb'd nothing, and had no design to kill, but to plunder, *præda causa*, if they went out frequently, and to high wayes with that design, for if they actually Robb'd, or had a design to kill, though they killed not, yet they are still punishable by death, by all Laws, οἱ τὰς ἐποδὰς ποιῶντες δὲ τὸ πῦρ δούσι.

II. The quality of frequent and common committing Theft and Robberies, is not only a quality that raises the Crime of Theft alone, from being punishable by restitution, to be punishable,

punishable by death in other nations, but by the 51. Act, 11. Parl. F. 6. It is declared, that landed men who are convict of common Theft, Receipt of Theft, or Stouthreif, shall incur the crime and pain of treason; upon which Act, it was contraverted, whether the word *common*, was a quality and adjunct to be added to the Receipt of Theft, and Stouthreif as well as Theft, since the Act says but only common Theft, nor common Receipt of Theft, nor common Stouthreif; and it was urged, that it was reasonable, that this should be understood of all, seeing it was that quality, which rendered them Treason. For simple Receipt, would not have been declared reasonable of it self; and by the foresaid 1. 28. the reiterating this crime, aggravated it from banishment, to death, and in the ordinary way of speaking, men cease not to repeat such words: Likeas it was just, that as the crimes were in Landleffe men punishable, only by restitution, or death, if repeated so by Landed men, the punishment should grow proportionally, and infer death or Treason, if commonly committed. To which it was answered, that the words of the Act of Parliament, are conceived disjunctively; Likeas it seems, that if the Parliament had designed, to add the word *common*, to Receipt and Stouthreif, they would have added the same to prevent this objection: and it seems indeed, that Stouthreif, which is that species of Theft, that we call Robbery, deserves to be punished as Treason in landed men, though they do not commonly commit the same, because it being easier for landed men to commit Robbery, and it being more probable, that they would Rob than steal, this crime ought to be as severely punished in them, as common Theft; and accordingly the said alledgiance being proposed for James Wood, the 21. May 1601. it was repelled.

III. In this process likewise, the said James, having been accused for robbing the writs and evidents belonging to Bonington, It was alledged, that the pursuer ought to condescend

upon the Lands, to which these evidents belonged, because if that were condescended on, the Pannel would prove, that the said Lands, and consequently, the evidents did belong to himself, which alledgiance was likewise repelled, nor was it found necessary, that a Civil precognition should proceed in this case, and in *June 1668.* it was found that a Libel was relevant, bearing in general, that Jewels or Pearls were stolne, without condescending upon the particular number of them; and it being alledged for the *Macgibbons, Decemb. 8. 1676.* that the Libel was not relevant, not condescending upon the persons from whom the goods were robbed, nor what goods were robbed, but only in the general, that the Pannels did frequently rob the houses of *Garnitilly*, and *Strathurds* tennents.

To this it was answered, that though where private parties pursue, *ad interesse privatum*; such a condescendance is necessary, because the informers may know, nor can the private damage be repaired, except his losse be liquidly proved; yet when the pursuit is at His *Majesties* instance, and that an habitual, and constant trade of robbing, and forning, is libelled, It is sufficient to libel in general, and if the speciality be not proved, the Pannels have no prejudice, for they will not be found guilty, nor will the probation be concluding; but it is all one to His *Majesty*, which of His subjects be robbed, or what be taken away, it being His *Majesties* interest, that no constant, and habitual Robbery be committed in his Kingdoms; nor is there any thing more ordinary, then to sustain Libels against such as are guilty of open rebellion, without condescending upon the particular persons who were killed or robbed in the Rebellion. And whereas it was urged, that if the particular goods alledged to be robbed, were condescended on, the Libel might be elided by this suitable defence, *viz.* that they had a right to the goods, or had the consent of the owner; it might have been answered, that they were not precluded from such defences, by the generality of the Libel, for the Par-

nels might alledge that the taking away of such and such goods could not interr Robbery, because they had a right to these goods, or were warranted to take them away by the consent of the owner.

The Justices sustained this Libel, notwithstanding of the generality foresaid.

Alexander Steil being pursued in *August 1669.* for stealing and Robbing, evidents, writs, and cloaths, out of Captain *Barclays* house, who was his Master at that time.

It was found that the pursuer, behoved to prove, that the said evidents were taken away by force, or breaking up of doors; and that the servants having of them was not sufficient to infer Theft, though he had delivered them to a third party: and albeit this should be proved, yet the Justices found this alledgeance relevant, *viz.* that this deposition alledged to be stolen, being given to the Pannel, that he might counterfeit the subscription, and he having no freedom to comply therewith, he did run away to the Lord *Fyvie*, and delivered up the same to him without any reward, which alledgeance was found relevant, as said is, though it seems to be contrary to the Libel, and as to the wearing cloaths, the Libel was not found relevant, except it had been proved that they belonged to Captain *Barclay*, and were under his locks at the time, since it was offered to be proved, that the servant had worn these cloaths publickly in his Masters service, which purged the presumption of Theft. It may be doubted what a poor servant could do, if he had broken up the doors really at his Masters desire, who had sent him home to bring papers, though he could not prove the command otherwayes then by his masters oath, for his master might alwayes easily prove the breaking up of the doors.

IV. So odious is this crime, and so frequent was it, that by the 21. *Ass. Parl. 1. Jac. 6.* all such as receipt, for, or give, maintain, or give meat, harbour, or assistance to any such Robbers, are

are declared art and part, but it would appear that this Act strikes only where there are Letters of Intercommuning, and that because the Act it self bears, *to the effect it should be known to what purpose they Intercommunied*, and because it were too severe to punish men as thieves, except they were put in *malis fide*, so to do, by publick Proclamation, or Letters of Intercommuning.

V. By the 227. Act, Parl. 14. F. 6. It is declared (for the same hatred against Robbers) lawfull to all his Majesties Leidges to concur and joyn against Clann and Border Thieves, and to take and execute them, all Magistrats and Free-holders, being made Justices for that effect, by the said Act. But this part of the Act is now in desuetude; and it appears to have been but temporary, *quo ad* the power of executing, but Robbers may be lawfully seized on without authority.

VI. Oppression is ordinarily but a quality of other crimes, but yet there are sometimes special dittayes founded thereupon, *per se*; and there are some particular Acts declaring several species of it to be punishable, as reif, or by other specifick punishments mentioned in the saids Acts; and thus it is oppression to compel the Kings proper Tennents to ride, or do service of Avarage, Carriage, Shearing, Leading, &c. and should be punished accordingly, Act 21. P. 2. F. 4. It is oppression to take Caups (that is to say, a duty for protection to be given by privat men to such as thieves, and other great men) Acts 18. and 19. Parl. 2. F. 4. *vid. de verb. signif.* It is oppression for a Crafts-man to take custome, or any other taxation, from another of that same Craft, or for them to make privat Acts among themselves, prejudicial to the people, Acts. 42. and 43. Parl. 4. James 4. Act. 111. Parl. 7. F. 5. and Act. 4. Par. 19. F. 6. It is oppression for Customers to exact more then their due, Act. 46. P. 4. F. 4. It is oppression to molest Magistrats of Burghs, and other Merchands to use their priviledges and liberties, Act. 26. Parl. 4. F. 5. It is a kind of Oppression,

to exact more freight from Passengers, or greater prices for Weavers and handy-work, then what is allowed and usual, *Act* 21 and 23. *Parl.* 5. *Q. M.* It is oppression to stop or make impediment of common high ways, to, or from Burghs; *Act* 54. *Parl.* 6. *Q. M.* It is oppression for Officers to extort the Leidges, *Act* 33. *P. 5. F. 3. & Act* 83. *Parl.* 11. *F. 6.* or to put out, or put in the Roll of Assizours given to him by the pursuer. *Act* 88. *Parl.* 11. *F. 6.* In which last *Act* common oppressors are punishable by death: Oppression is also punishable by death, *Act* 42. *Parl.* 4. *Fa. 4. Act* 88. *Parl.* 11. *Fa. 6.*

VII. Because oftimes in thir cases, the Pannel pretends, that what he did take by force, was his own, or that he had a right thereto, therefore except the violence be very great, the Justices use to ordain the matter of right to be first discussed before the Civil Judge, as was found in *Novemb.* 1675 in the case of *Inglis of East-sheilds*, and in many other cases: and by the 33. *Act.* 4. *Parl.* *F. 5.* It is declared, that as for depredation, masterful reiffs, and spoilzies, particular dyets shall be set therefore at the discretion of the Lords, the matter being first Civilly discussed before them. Upon which *Act* it is oftimes alledged before the Justices, that the cause must be civilly discussed before the Session, in all masterful reiffs; before they can proceed to cognosc thereupon; but notwithstanding of this the Justices do constantly sustain Criminal processses for Reiffs and Robberies, without any previous civil precognition; and they find this *Act* to be now in detuetude, as in the case of *Monimuske* 27. of *November.* 1611. And I think, that by *Lords*, in that *act* are not meant the Lords of Session, for that *Act* is two Years prior to the institution of the Session; but that by *Lords*; there, are meant the Justices themselves, for there being no Session at that time, the Justices were Judges competent to many Civil cases, originally such as perambulations; &c. and to all Civil cases, if they had a necessary connexion with, or dependance upon criminal cases. And therefore, where the person

person who was alledged to have committed masterful refts, or spuilzies, could pretend that what he did was in prosecution of his own right. The Justices had a latitude to try the matter of right, first Civilly, but this was never necessary, for it is by the Act left to the discretion of the Judge.

It remains then, to be considered, how far the taking away by violence what is really a mans own, can infer a guilt against him. Which difficulty may be cleared in these few conclusions, 1. That the thing violently possessed, though by a common spuilzie, and much more by a masterful reft, ought to be restored, *nam spoliatus est ante omnia restituendus*, and that though he who took away what was his own, could instantly prove his right, and since this holds, where the violence was only committed by a simple Ryot, it should by a stronger consequence hold, where the thing was taken away by such violent means as amounted to a crime, and so this should be no good defence, either against a Criminal, or Civil pursuit. 2. Not only ought the thing to be restored, but even the true Proprietar who introneted with his own, by open force & violence is punishable, for the Law wil not allow that any man should be Judge to himself, but much lesse that he should use violence, & force upon any accompt, and this were to invade or assume Jurisdictions, which is in it self a crime.

The third conclusion is, that if any man do by force or violence, extort from another, a writ, or obligation, which he could have obliged him in Law to grant, that force is not only punishable Criminally, but the deed so extorted is reducible by a Civil pursuit: as was found in *Fannary 1677*. Though it was alledged there, that such force might be Criminally punished, yet the deed so granted could not be reduced, since such deeds were only reduceable, where something might be restored, but here nothing was to be restored; since the deposition alledged to be extorted by force, depended upon a former minut, by vertue whereof the granter could have been

been compelled to have granted the same; and this was the same case, as if a Creditor should compel his Debitor by force, to pay him what was his own, in which, though the force be punishable, yet the Debitor could not repeat what he had justly payed, as is clear, not only by common sense and reason, but *l. 12. ff. quod met. caus. Juliae* us ait eum qui vim adhibuit ut debito suo ut ei solverit hoc editto non teneri propter naturam actionis metus causa quae damnum exegit quamvis negari non possit in *Juliam* eum de vi incidisse & jus crediti amisse. To which it was answered, that there could be nothing more disadvantageous to the interest of the Common-wealth, nor a greater usurpation against authority, then that every man should be his own Judge, and force the Executioner, and the Law justly presumed, that he had no legal right, who would not pursue it in a legal way, and if this were allowed every man would dis-cusse his own Suspension himself, by forcing his Debitor to pass from it, and would force the Heir of his Debitor, to give him Bond, or his Debitor himself, to fulfil all minuts without any regal pursuits; every Master would thus thrust out his Tennents, and every Creditor force his Debitor to pay, by carrying him away Prisoner, and when he were that length he would alledge that *nihil illi deest*, and as to the former Law, it was answered, that the Civil Law in detestation of force and violence, did allow three several remedies to the person vio-lented, *viz. Edictum pratoris quod metus causa, &c. Lex ju-lia* which punisheth the force as a Crime, & *decretum divi Marci*, all which three are expressly mentioned in that Title, and though by the old edict, and the *Lex julia*, he who for-ced his debitor to pay what was justly due, could not be by these remedies restored, *quia nihil deorat vim passo*, as the Law formely cited does prove; yet, *ex decreto divi Marci*, which was posterior to these remedies (as *Marcus Antoninus* was long posterior to *Julius Caesar*) even he who took pay-ment of his own, could not defend himself by alledging upon

his right: which excellent Law is set down, *l. 13. ff. quod metus causa. Quisquis igitur probatus mihi fuerit rem ullam debitoris vel pecuniam debitam non ab ipso sibi sponte datam sine ullo iudice tempore possidere, vel accipisse, isque sibi jus in eam rem dixisse, jus crediti non habebit.* And Faber upon that Law doth excellently conclude, that this was a just supplement of the former Law: and Cujacius allows this remedy, not only to the publick, but even to the privat party, for *qui sibi jus dicit jus crediti non habebit*, which implies an annulling of the deed, *quod ad privatum interesse*. And Cujacius observes well that the party forced, *poteſt condicere*, and how can it be imagined, that the Law would ordain the extorter to be punished, and yet not restore that which was extorted, the publicks interest resulting only from the privat injury done to the Party, and as the Fisk uses not to pursue without an informer, so the privat party injured, would not inform, nor concur, since he could not expect any reparation, and thus the Crime and injury would remain unpunished: But even according to the *l. 12. and 14.* so much founded on, it is most clear, that they were not in the case of these Lawes, but on the contrary, that even by these Lawes, the foresaid principle is just, since restitution is still to be granted, *ubi actori aliquid abest & ubi damnum intervenit*, but so it is, that in this case the pursuer is extreamly prejudged by this disposition craved to be reduced, *ex capite metus*, since if it were reduced, he would easily defend himself against the alledged minur, upon many grounds then represented. It was also urged, that though in the restitution of Minors, the Law restores them only when they are Leas'd, since that remedy is mainly introduced for their advantage; yet in reductions, *ex capite metus*, the Law designs mainly, that no man should have advantage by his own oppression, nor no man be obliged without his own consent, and so it rescinds the deed, though the party be not leas'd, and the edict it self says, *quod metus causa gestum erit ratum non habebo*, without

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considering lation, & *quod ratum non est, irritandum est*, that is to say, is reduceable. And whereas it was pretended, that the former brocard, *Spoliatus est ante omnia restituendus*, did only hold where the thing was taken away, *vi ablativa*, because that could be easily proved, but not in deeds extorted, *vi compulsiva*, which force depending upon inward Acts of the mind, could not so easily be discovered, and could be easily mistaken.

To this it was answered, that though those two differ in themselves, yet either of them infer restitution, as we see all alongs the Title, *quod metus causa*, and in the practice of our reductions, *ex capite metus*. In both which, deeds extorted, *vi compulsiva*, are reduceable, and the persons injured restored against them, and since *vis compulsiva*, can infer more prejudice, then *vis ablativa*, since *vis ablativa* can only robb us of moveables, whereas *vis compulsiva*, can robb us of our estates; it were strange that the Law should not assist the injured persons, most where they may be most injured; nor can it be denied, but that compulsion, falls as much under sense, and so can be as easily proved as a spuilzie can. For though it may be doubted whether some degrees of force, should alwayes infer restitution, yet the probation of these degrees, if once admitted, is alwayes easy.

The Crimes answering in the Civil Law to oppression, were *vis publica*, *vis privata*, & *concussio*. Those were punishable, *l. Julia de vi publica*, who raised Arms, or did violently eject men out of their houses, or lands, & *δικησαν ανθρωπος επι το γινεσθαι* *l. 4. Basil. h. t.* these who assisted the Oppressors with men, are guilty thereof, and the punishment was, *aqua & ignis interdictio*. These were guilty of *vis privata*, who oppressed upon a privat account, and the punishment was the confiscation of the third part of their goods, with intamy.

Concussio was that Crime, whereby money or any thing else was extorted by open force, or who employed their power

and authority as the instrument of Oppression. I have seen processes and remissions relating to this crime with us, and the punishment of it is arbitrary, both by the Civil Law and ours.

The taking of *black-mail*, is a kind of Concussion in our Law, and by black-mail is understood, the paying of money, or any gratuity to thieves, for their protection, and by our Law not only the takers but the payers of black-mail, are punishable as thieves and Robbers, by the 21. *Act Par. 1. Fa. 6.* and dittay is ordained to be taken up against them, *Act 102. Parl. 11. Fa. 6.* and the reason why the givers are liable, is because they maintain the Thieves, and keep correspondance with them, and do not dilate them. But yet except there be something of compliance, or a long tract of payment libelled, the Justices do not use to sustain payment of black-mail by it self, as a crime to infer any severe punishment, much lesse to infer the pains of Theft and Robbery, conform to the foreaid *Acts*, that payment being ordinarily more the effect of fear, then of compliance.

TITLE XXXV.

Art and Part, Ope & Confilio.

The words, Art and Part, explained.

The Act of Parliament, ordaining that Libels bearing Art and Part, shall be relevant, fully considered.

How far advice and counsel, do import accession.

How far the giving order to commit a crime, imports accession.

How far the command of a Superiour excuseth.

How far the command of a Father excuseth.

Who are constructed in Law to be assisters.

How a Crime may be ratified, and what is the import of Ratification.

Whether accessories can be pursued, till the principal actors be first discussed.

Whether complices and accessories are to be punished by the punishment due to the principal Malefactor.

Not only these who are the actual committers of crimes, but these by whose counsel, direction, or assistance, any crime is committed, are likewise punishable, else the Law might easily eluded, and the chief contrivers might escape.

These who are assisters by counsel, or otherways, are in Law said to be Art and part of the crime, by Art is meant that

that the crime was contrived by their art or skill, *eorum arte*, by *part* is meant, that they were sharers in the crime committed, when it was committed, & *quorum pars magna*. The Civilians used in place of *Art and part*, *ope & consilio*: and these who assisted, and are art and part, are by our Law called *Complices*, which word is borrowed from the Doctors, for they call *Consiliarios fautores & instructores complices*, *Carter. pract. crim. §. homicidium, num. 14.*

II. By the 151. A^ct, 11. Parl. *J. 6.* It is ordained, that nothing can be objected against the relevancy of that part of the Summons, which bears, that the persons complain'd upon, are *art and part of the crimes* Libelled; by the relevancy of the Libel, our Law means that the Libel is *rite libellatus*. And I find the term relevant, used by the Doctors themselves, in the same sense that it is used by us: and thus *Gail. l. 1. obs. 86. judex debet tantum admittere articulos relevantes.*

The reason of the former A^ct is there rendered to be, because diverse exceptions were formerly propounded against the relevancy of the Summons, whereby parties were frustrated of justice; and it appears by that A^ct, that the pursuer was before the making of that A^ct, obliged to Libel, that the defender was accessory to the committing, and so guilty of the crime in swa far as, &c. and so was forced to condescend upon the manner of the accession, which seemed unjust to the Parliament, because (as I conjecture) the accuser could not know all the accession, before the examination of the witnesses; for it is not lawful to witnesses, *prodere testimonium*, to declare what they will depon: and this made it impossible for the pursuer to condescend exactly; whereas if he erred in exact Libelling, the Pannel or defender was affoizied, because the probation did not quadrate with the Libel. As for instance, if a person was accused for accession to the murder of one, in swa far as he gave direction to *A. B.* to kill him, possibly the defender was guilty of accession; though not by giving direction

yet by counselling *A. B.* or by directing *P.* or any other, to
 commit murder. In these and the like cases, the Pannel was
 guilty, and yet could not be condemned, because the Libel
 was not proved. Yet, upon the other hand, it seems hard,
 that such a general Libel as this, should be relevant; since it
 were as reasonable to Libel in general, that a person is guilty
 of murder, which generality would not be allowed: Likeas,
 the defender seems by this precluded of many defences, which
 would be competent to him, if the Libel were more special.
 And by the practice of other Nations, the Libel must conde-
 scend specially upon the manner and nature of the accession:
 But that which seems to me most inconvenient, is, that the
 Affizers are Judges to the relevancy of the condescendency,
 which infers art & part. Albeit many questions, *in jure*, are there
 started, which are very intricat, and which have troubled the
 greatest and most accurate Doctors; for by our practise, the
 pursuer, who Libels art and part, will not be obliged to con-
 descend how the defender is art and part, or accessory to the
 Crime committed, as was found in the pursuit at *Sinclars* in-
 stance, against Captain *Barclay*: But the Libel being rele-
 vant, when art and part is Libelled, the defender must go to
 the knowledge of an Inquest, and probation is thereupon led;
 in which many impertinent and irrelevant Interrogators are
 propounded; whereas, if the Justices were Judges to the re-
 levancy, no impertinent Interrogator would be allowed, since
 nothing could be interrogated, but what were found to depend
 necessarily upon the accession, which was found relevant. As
 also, after the probation is closed, the Advocits upon both
 sides are forced to debate the relevancy of the probation, and
 how far the accession is relevant; and here Laws, decisions, and
 Doctors, are alledg'd to Affizers, who understand neither.
 As for instance, if art and part of murder be Libelled, proba-
 bly the pursuer will interrogat if the witnesses heard the defen-
 der say, *that it were no fault though the person who is killed were*
stab'd.

stab'd, or approve the murder, after it was committed; upon which much debate might arise, for the defenders Procurators would contend that the Article was not relevant: And though the Justices did allow, or the Assizers did desire, that the witnesses should answer to these Interrogators, as they usually allow all Interrogators, reserving the relevancy to be debated after probation is concluded; then a learned debate would ensue before the Assizers, after closing of the probation, upon these points: So that the Assizers are against the intention even of our Law, Judges to the relevancy, and to the points of Law; by whose ignorance also the Lieges are oftentimes much prejudged. But when the pursuer designs to have the relevancy of his condescendency judged by the Justices, he uses to Libel, that the defenders are art and part of the Crime Libelled, in so far as they gave order, or advised the committing of it, &c. *quo casu*, the relevancy of art and part being specially condescended upon, is decided by the Justices who are Judges to all that is in the Libel.

Though it be sufficient to Libel generally, that the complices are art and part, yet the Libel must bear expressly who are complices; for it is not sufficient to Libel who are complices generally, but their names and designations must be specified, *K. Fa. 6. Parl. 6. Act 76.*

Because the Assizers are Judges to the relevancy of Art and part, and that the debates made to the Assize are not upon record, being only delivered, *viva voce*, therefore it is that there are but few decisions here adduced for clearing the relevancy of this part of the dittay.

To the end that all the Lieges who may be assizers, may understand what accession is relevant to infer a guilt, they will be pleased to understand, that one may be art and part by deeds preceeding the crime, either by counsel or command, *consilio et mandato*, by deeds concomitating the Crime, as by help, or countenancing, *ope & assistentia*, or by deeds subsequent

the committing of the crime, as by ratihabiting or recepting, all which I shall treat separatly.

III. How far the advising, and counselling a man to commit a crime, is punishable as an accessio, and art and part of that crime, is thus resolved by the Doctors; if (say they) the committer of the crime, would have committed it however, and though he had not been advised thereto, then the adviser is not liable, so as to suffer the same punishment with the committer, but it is to be less severely punished: whereas, if the committer of the crime would not have committed, and perpetrate the crime, if he had not received that advice, then the adviser and committer are equally to be punished, *Clar. quest. 89.* But I am not satisfied with this opinion, for since the adviser did all that in him lay, to have the crime committed, and that the effect followed, he is surely as guilty, as if he had committed it; seeing in crimes we look to the design, and not to the event, *in maleficiis spectatur voluntas non exitus & maleficia propositum distinguit*, at least the adviser is equally guilty, whether it had been committed, with, or without his advice, even as he had been guilty, in case of assistance, though the crime would have been committed without his assistance; nor is guilt spared by lessening: And it is impossible to know whether the committer would have committed it, without the advice and counsel given. Other Doctors are of opinion, that in atrocious crimes, the adviser and committer are equally punishable, which certainly holds in Treason; but that in lesser crimes, the adviser is to be less severely punished than the actor: and this distinction I like better, and is more consonant to our Practique. In our Law advice and counsel comes under art, for advice is a species of contrivance and art; and therefore advisers may appear in our Law to be punishable, as the principal offenders, seeing art and part is punishable, as the principal Crime with us; yet the Council uses to mitigate the punishment

ment, where the crime is not atrocious: And the Judge should here consider, whether the adviser gave the counsel, upon the account of former malice, conceived by himself: or if it was only given in resentment of any wrong done to the committer, and he is to be more severely punished in the first case, then in the last. 2. In the case of advice, the advisers age is much to be considered; for though Minors, and these who are drunk, may be punished for Murder, yet it were hard to punish them for advice. 3. The words in which the advice were conceived, should still be interpret most favourable for the adviser, for words are capable of several, and distinct senses, accordingly as they are understood by the speaker; and words do vary by the accent, or punctuation. 4. If the adviser retreated his opinion, he ought not to be punished, if he thereafter dissuaded the committer: but some require, that *eo casu*, he do intimat to the person, against whom the advice was given, what danger he is in, for else the advice once given, may occasion the Murder, though thereafter disowned.

IV. He who gives order to commit a Crime, is in our Law, art and part of the Crime committed, as was found in *John Mackintosh's* case, the 11. of *May* 1673. And is in the Civil Law punishable, in the same way and manner, with the Principal Party, whether that Principal, or chief Committer, would have committed the Crime or not, without that *mandat*, *nam quando mandatum cadit in delictum non queritur an mandatorius perse commississet* *Gomes. in s. penales just. de actionibus*. And seeing this distinction holds not, in *mandato*, I see no reason why it should hold, in *consilio*.

Not only if one give order to commit the Crime, is he liable as art and part, but if he give order to do that which is inseparably joined to the commission of it; and even if he give order to do that, which being unlawful in it self,

self, may produce the crime; and thus, if one give order to wound a man, it is thought, that if the person die of the wounds he receives, the giver of the mandat is guilty of the Murder, except the order be restricted to wound with a Stone, Club, or some such Weapon, as is not mortal; for in that case, the committer is only punishable, *pœna extraordinaria*, and by an arbitrary punishment, not reaching death, *Clar. quest. 89. num. 5.*

What words will inter a command, cannot be determined; but it was found in *Mackintoshes* case, that his desire to bring *Bruchdarg*, who was killed, dead or alive, did not inter his being art or part of the Murder; for he having a Caption against *Bruchdarg*, he might desire the Messenger; or his sons to pursue him, if he resisted the Caption. And yet if the words can import properly no other sense, then such as would inter a crime, the speaking of them will inter art and part; and thus *Frazer of Culbockie*, being pursued on the 9. of July 1675. for detorcing a Messenger, he was found guilty, because it was proved, that after he was apprehended by the Messenger, he cryed to his natural Son to come up and help him, and to give these men their reward; whereupon his natural Son did invade the Messenger, and he thereupon escaped. And in general, I think words should be very clear, and spoke too by a person, who hath previous malice, else they ought not to infer death, for words are oft spoke in jest, as when one of our Kings desired thole of *Caithness*, to go and sup their Bishop in Broth.

It is determined also by the Doctors, that if the giver of the mandat inter the committing of the crime to a third person, and he to a fourth; if the crime be committed by the third or fourth, that all of them are punishable, with the same punishment *Bald. in l. 1. §. nec autem, C. de caduc. tollend.* but seems hard, seeing the person was not killed, in that case, by the order of the first committer, and possibly the discretion

of the person, to whom the first mandat was given, was considered to be such, that he would not excuse the mandat; and many cases may fall out, whereby it might have been, that the giver of the mandat, would not have given the mandat to any other, and therefore, *Cap. II. Cautela. 39. & Menoch. de arb. casu. 353.* are of opinion that if the Murder was committed by any other then him, to whom the commission was granted, that the giver of the mandat is not liable in that case, and generally they conclude, that if the receiver of the mandat, did exceed his mandat any manner of way, that then, if the crime which was order'd to be committed, was a mean and small crime, the giver of the mandat is no way to be punished: but if the crime was atrocious, then the giver of the warrant is to be punished, *pena extraordinaria*, by an extraordinary punishment, for he who gives order to commit an atrocious crime, incurs a punishable guilt, in the very giving of the order, *Menoch. ibid. num. 9.* They likewise determine from this reason, that the commanding to kill *A.* if he be not killed, but *B.* be killed, is punishable by an extraordinary punishment: the like also holds, if the command or mandat did bear to commit the crime in one Moneth, and it was not committed in that Moneth, but many other, *Menoch. ibid. num. 21.* Though mandats in civil cases are only probable, *scripto vel juramento*, yet in crimes they are probable by witnesses, as all crimes, and art and part are.

V. How far the mandat, warrant, or command of our Superiours excuses, is variously debated by the Doctors; but their dictates may be resolved in these conclusions, 1. The commands of the Prince excuses altogether in lesser crimes; but in atrocious crimes, it excuses only from the ordinary punishment, *metus panam attenuat non in totum tollit*, for the committer in this case doth not commit the crime, *dolo malo & quisitra dolum deliquit ordinaria pana non punitur & illi qui*
aliquid

aliquid adversus suam voluntatem agit crimem non adscribitur ad cogenti; cap. 1. 2. & cap. 32. quest. 5. The command of the Magistrat, acting as a Magistrat, or a publick Person, excuses or defends the committer, from the ordinary punishment, in atrocious crimes, and from all punishment in lesser crimes, *l. quanquam & l. quod principis ff. de aqua plu. ar. end.* A mandat given by a Master to his Servant, excuses him from the ordinary punishment, when the crime is atrocious, and the Master is known to be cruel. And thus I have seen the servants of one who was hanged for Robbery bailed only, because they knew not that their Master was a robber, and that was the first act; whereas if these had continued in his service thereafter, they had been hang'd, notwithstanding of both his command, and known severity, seeing how soon they knew him to be a Robber, they should have deserted his service; and by the *19. chap. num. 9. stat. Will.* the Servant is punishable though he obey his Master, if he do not desert his Master, or desert his service. In lesser crimes the command of the Master excuseth altogether, *liber homo, ff. ad l. aquil.*

VI. The command also of a Father excuseth the Son, in lesser; but not in atrocious crimes, except other favourable circumstances concurr; and thus *John Rae* was not put to the knowledge of an Inquest, because he was young, and had incurred in the Theft, at the command of his Father, *1. February 1662.* All which is most fully treated by *Menoch, de bir. Cas. 353.* And I find in our Law, that a wife is liable to the ordinary punishment, though she obey her husband, in committing atrocious crimes, *Stat. Will. cap. 19. num. 8.* from which I conclude, that by the same Statute, she had not been liable in lesser crimes.

VII. The assister is art and part of the Crime by our Law; and assistance by the Civil Law, and Doctors is variously

only punished, for these who give assistance before the crime be committed, are punishable in the same manner with the committer, *l. nihil ff. ad. leg. Cor. de siccar nihil interest* *vidat quis an causam mortis prebeat*, but this conclusion holds only where the assister knew not, that the assistance he gave tended to the commission of the crime; which knowledge is not presumed, but must be proved: This conclusion holds, only where the assistance did influence the crime immediately, but not in remote assistances, such as the lending of Armes, for remote assistance is only punishable *pena extraordinaria Menoch. de arbitr. cas. 349.*

Assistance given during the Commission of the crime is punishable in the same manner as the principal crime, except the assistance given be very remote, or that the assister be ignorant, as if one should assist a person to drive away Cattel which the driver said to be his own Cattel.

It is here resolved by the Doctors, that he who was in Act upon the place where the crime was committed, is reputed assister, if he stood very near the place, and was a known Enemy to the person killed, or a known Friend to the Committer, and had no business else in that place, at that time; or if the invader wax'd bolder, or the person invaded weaker by his presence: But if these or such like circumstances be not, a meer by-stander is not art and part. And I remember that it was decided in the case of *John Mackintosh*, that his presence was not accession, *si navabat operam rei licita*, as assisting a Messenger; and in the case of *a. Baxter*, who was pursued for the tumult, in *Anno 1666.* at which time, *da assistentia*, was not found punishable. And it is to be sorry for people to run together, where noise or confusion is made, and the assistance is oftentimes too advantageous, either to relieve the weaker, or to separate and red, as we say, both parties; that it were unfit, as well as unjust, to punish by-standers: but this depends upon many circumstances,

questio arbitria addit, ad Cl. quest. 90. num. 17. yet I would advise the redder, or assister, to cry, that he intends to do no prejudice to either party, or not to interest himself, except he be known to be very neutral.

These who kept the cloaths or baggage of the committers, are guilty of assistance, *Foh. de Annan*, as are these also who hindered others to rescue the persons invaded.

Assistance given after the Crime is committed, scarce deserves the name of assistance, as *Bartol.* observes, *ad l. 3. S. 51. inquam ff. ad Sillan.* And therefore the Laws of *Millan* do only inflict a pecuniary mulct in this case, as *Menoch* observes, *l. 349.* And I have seen the Council inflict only an arbitrary punishment upon him who assisted to make the escape of a person who had recently committed a murder. But in general, I approve *Bartol's* Doctrine, who thinks, that whether the help and assistance was given before the committing, at the time of the commission, or after it, yet the assister is punished as the chief actor, if the commission of the Crime was received upon by both at the beginning, and before the Crime is committed, *Grisea (pes data auxilii ad evadendum dicitur consilium ad maleficium committendum, Bartol. ad l. furti. ff. de furto,* else the Crime is not punishable in him who assisted only after it was committed, as severely as in the chief actor. But the Doctors do not distinguish here, whether the Crime could have been committed by the principal party, though the assisters had denied their help; yet does this lessen the assisters guilt, though it does not distinguish it, *Clar. quest. 90. num. 7.* and so lessens the punishment in many cases.

III. The ratifying a Crime is not punishable, according to the Doctors, in Crimes which are chiefly committed to satisfy the lust of the offender, as if one should ratify the Adultery committed by another, merely to affront the Husband, *quod* the Doctors think, that the ratifier may be punished arbitrarily; but the ratifying Crimes which are chiefly committed

red

ted to offend others, as Murder, Theft, &c. is punishable, if the Crime was committed by the actor, in the name of the ratifier, and if the ratifier knew it was committed in his name when he did ratifie it, but except these two concur, Lawyers think that the ratifier is not punishable: and yet in the general, the approving or owning Crimes, seems to be of ill example, and therefore punishable in some degree, by the example of that excellent Law, *l. si quis, §. qui Abortivus, ff. de penis.*

By our custome, ratification, or ratihabition of a Crime, we call it, falls not properly under art and part, no more than under the general word *auxilium*, except the ratifier had done some deed, or been in some accession to what was done before the Crime was committed, as was found in *Mackintoshes case* 11. June 1673. For it were hard to infer a Crime from any word approving the deed, it being most ordinar for men to say *was well bestowed, or I am glad*, when they hear of the murder of him whom they would not have killed, as *Bart.* observes, and therefore it seems not to be punishable by our Law, which punishes only either the Crime it self, or these who are art and part. And I remember, that when the Laird of *Asint* was pursued as accessory to the murder of *Montrose*, in swa far as he had at least ratihabited the Crime; having vaunted, that he had taken him Prisoner at his own house, & *jaçtatio, & gloriation* were punishable, as *Menoch* observes, *de arbitr. cas. 331.* Yet the Parliament inclined not to punish him, if nothing else could be proved. But whatever may be said of ratihabition in general, yet certainly, ratihabition of Treason, is punishable as Treason; and it may be also contended, that the excepting of a reward by one, as if the Crime had been committed by him, is punishable, since that reaches further than naked ratihabition; so that certainly *Asint* had been punishable as a Traitor for that accession, if he had not been secured by an Act of Indemnity.

IX. There remains yet two practical questions to be resolved; The first is, whether such as are accessory can be pursued, till the chief actors be first discusst, and either found guilty, or assolizied. And that the chief or principal actors ought to be first discusst, seems most reasonable, 1. Because it is the nature of what is accessory, to follow, and not to preceed that to which it is accessory. 2. The principal party might have a defence, which the assister doth not know, at least cannot prove. As for instance, if a man be pursued as art and part of driving away Cattel, possibly he was but a servant to the person who did drive them, and who, if he had compeared, had proved that the goods were his own; or if he were pursued as art and part of convocating the Liedges, or of rising in Arms; possibly if the principal convocator were pursued, he would alledge he had done so by warrand from Authority, and would produce his warrand, which none else could have in keeping. 3. By the opinion of *Clar. quest. 90. num. 6.* and other Doctors, *quando proceditur contra aliquem tanquam quod prestiterit auxilium delicto debet primo in processu constare principalem deliquisse.* 4. By the 26 Chap. 4. Book, Reg. Maj. entituled, *Of the order of accusing Malefactors for Crimes*, it is said, that the principal Thiet should be pleaded and discusst before him who commanded the same to be done, or before the refetter. And in the 4. vers. of that Chap. it is generally said, and swa it is manitest, that the commander or refetter shall not be charged, till the principal doer be first convict by an Assize. From which words, and from the general Rubrick, it is clear, that this conclusion holds, not only in Thiet, but in other Crimes. Likeas, *Skeen* in his Annotations upon these words, observes from this Text, that *complices criminis non possunt accusari ante principalem malefactorem nam sicut remoto principali remouetur accessorium, ita absoluto malefactore absolvuntur complices & consentientes*, and cites for this opinion, *Gloss. in cap. 1. de offic. jud. de legat.* which conclusion is also clear, as

to Theft, from the 83. *Chap. quon. attach.* Upon which Law a verdict syling *George Grahame*, as receptor of Theft, was rescinded, by warrant from the Council, because the principal Thief was not first discuss'd. And as to all Crimes, by the 29. *Chap. Stat. David 2.* entituled, *The complices should not be punished before the principal malefactor.* It is also observable from the last *vers. 26. chap. lib. 4. Reg. Maj.* that the principal malefactor should be not only accused; but convict by an Assize, before the complices can be accused; so that it is not enough the principal act or be declared fugitive, which is likewise conform to *Clar. quest. 90. num. 6. nam non sufficit*, saith he, *contumacia facta*, which answers to our denouncing fugitive, as formerly observed. I find likewise that by the Law of *England* the principal ought to be attainted after verdict or confession, or by outlawrie, before any judgement can be given against the accessory; but the principal must be surely kept until the accessory be attainted, *Bolton cap. 24. num. 38.*

Notwithstanding of all which, *Charles Robertson* being pursued as accessory to the casting down of a house belonging to *Follie*, which house was libelled to have been cast down by his sons and servants, at his command. The Justices found that he might be put to the knowledge of an Inquest, albeit the children and servants were not first discuss'd, because the Act appointing a Libel to be relevant, bearing art and part, did abrogat the foresaid, 4. *vers. 26. Chap. l. 4. R. M.* since such as are pursued as art and part are all principals: And the Advocate alledg'd, that it were absurd that the King should be prejudg'd by the absence of the principal party. To which it was answered; that the Act of Parliament, and the Law cited out of *R. M.* were in *materia diversa*, and very consistent, since the one determined only the manner of procedure, and the other what Libel was relevant, & since that Act it was constantly found that the Thief behov'd to be punish'd before the Resetter, which shews the foresaid Law of the Majesty is not abrogated; nor

was the King prejudg'd, seing if the principal party were discul'd and denounced fugitive, the accessory might be proceeded against, but on the contrary, the Liedges would be much prejudged, if this order were not observed, for probation might be led against absents, *eo casu*, contrair to the fundamental Law of the Nation. *V.g.* if *A. B.* were pursued as hounder out of *C. D.* to commit a Murder, probation behov'd to be led that *C. D.* committed the Murder, albeit absent, else the hounder out could not be punish'd, *nam primo debet constare de corpore delicti*: Nor can any man be guilty of hounding out, except where the Crime is committed. And it were not only against our Law, but against reason, to suffer Witnesses to be led for proving that the person who was absent committed the Crime: For in that case his greatest enemies may be led as Witnesses, and his strongest defences may be omitted; and though the probation led against him in absence will not be concluding, yet *semper gravat famam*, and leaves still a disadvantageous impression.

In this case it was likewise found, that ratihabition of a Crime might be interred from the said *Charles Robertson* his retreating the committers of the Crime, though they were neither declared fugitives, nor Letters of Intercommuning against him: And his saying these words, *They did too little, and I wish that they had taken a Collop out of his Cheek*, was a ratifying of the Crime, since the Crime was committed by his own sons and servants.

X. The second Question is, whether the complices, and such as are art and part of a Crime, should be punished by the punishment due to the principal Malefactor? That they should, seems clear by the *Act 151. Parl. 12. K. J. 6.* where the Libel bearing art and part, is ordained to be found relevant, which implies, that art and part should infer the punishment concluded in the Libel; for that is only relevant which can intert the conclusion. 2. It is said, *cap. 38. quon. attach.* and then

it shall be conform to that which is said, *Consenters and doers should be punished with the same pain.* 3. By constant custome in all Criminal Courts, art and part is punished as the principal Crime. Notwithstanding of all which, I think, the foresaid conclusion very rigorous, for *pæna est commensuranda delicto*, and to punish the more and the less guilty equally, seems against nature and justice: And by the Laws of all other Nations, and the opinion of all Doctors, accessions are punishable according to their proportional degrees of guilt; and albeit the Act above cited, sustains the Libel, yet it ordains not the punishment of art and part, to be the same with the punishment of the principal offenders; but though the Act did bear the same expressly, yet by the opinion of the Doctors, a Statute, bearing that such as are accessory shall be punished as the principal malefactors, is to be restricted, *ad opem quæ dedit causam maleficio, & non de quolibet modo auxiliandi annor.* ad Clar. quest. 90. num. 28. It would therefore seem just, that not only the Justices, or parties, should make application to the Councel, and interpose that the punishment should be mitigat according to the degrees of the guilt, as the custom now is, but that the Justices should have an innate power to proportion the punishment to the guilt proved; for none can understand so well the nature of the guilt, as the justices who hear the probation: and it is hard that the poor Pannel should lye under so great hazard, as to be exposed to a capital sentence, whereas it may be the Council will not sit so soon, as that he may interpose with them,

*Some Crimes punished amongst the
Romans, which are not di-
rectly in use with us.*

HAVING finished in the last Title what belongs to those Crimes, which our Law punishes directly, I resolved here to touch overly even those crimes which are little considered among us, not only that we might thereby know the *genius* of that wise Nation; but that we may consider how far it were fit to renew amongst us these excellent Laws.

The *Romans* considering how destructive those were to the Common-wealth, who endeavoured by all indirect means to screw themselves into publick employments, did therefore make this indirect dealing to be a Crime, and called it *Ambitus*, which punished *lege julia*, those who gave money, for making themselves Magistrats, or that they might attain to honours.

It is commonly thought, that how soon the power was transferred from the pople to the Senate, and from the Senate to the Prince, this crime ceased, because the Prince having the sole power of bestowing Magistracy and honour, is still presumed in Law to bestow them upon those deserve best, who *Grone-rog de leg. abrogat. ad h. t.* but yet I see not why the Prince may not justly cause punish such who have wronged both the publick interest, and his favour, in prostituting both to so unworthy a sale: and since Commissioners for Parliaments, and Magistrats of Towns are still elected by plurality of suffrages, I see not why such as bribe the electors may not be lyable to the same accusation.

The punishment of this crime, was deportation, which was much like our banishment, and in the lesse Towns it was punished

nished by a Fyne of an hundred Crowns, and infamy; and since it is a kind of bribing, I think it should be punished with us as such.

Residuorum crimen, was committed by him who converted the publick money with which he was intrusted to his own private use, and was punished, by fynyng him who was guilty in a third more then he owed.

This crime is punished by no expresse Law with us, but that this is a crime with us, appears clearly from its being excepted from the late Act of Indemnity amongst the other Crimes. The words whereof are, *Excepting all privat murders, &c. and the accompts of all such persons, as have intrusted with any of His Majesties Revenues, publick impositions, Excise, Fines, Forfeitures, Sequestrations, and all other publick money, for which they had not order, warrant, or assignment, (for their own privat use) or for which they have not duly counted, and received discharges thereof from such as pretend to have authority for the time to do the same.*

I doubt not but the Exchequer might be Judges competent to this crime, if committed by their own members, and the Council, if done by any of His Majesties servants, since there can be no greater injury done to His Majesties Government, then to abstract or invert his money, which is the nerves, not only of War, but of all power.

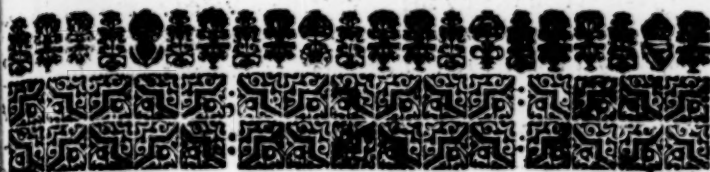
Peculatus, is a stealing of the publick money, as the other was a concealing of it, and this was punished in publick Ministers capitally, *l. un. c. h. t.* Though other thefts was not capitally punished among the Romans, so atrocious a crime did they judge the breach of trust, and so easy a thing it is for publick Ministers to steal publick money if they please.

This crime is certainly punishable with us by death, since all theft is so punishable: *Plagium*, was the stealing of men, and was punishable by death, *l. 7. & ult. c. h. t.* which agrees with the Law of God, *Exod. 21. 16. Dent. 24. 7.* and with

Egyptians and others stealing children, have been likewise punished by death, and such as force away men to be Souldiers, should be liable to the same punishment, though the Council uses to punish them only by an arbitrary punishment; and such as take away mens childeren upon pretext to marry them, before they come to the years wherein they may give a legal consent (which is 12. in women, and 14. in men) ought in my Judgement to be so punished. I have treated *crimen rependendum* in the Title *Brybing*, & *crimen annona*, in the Title *Fore-stallers*.

I shall end this first part relating to crimes, with *Theophilus* Apologie Subjoyned to his Title of Crimes, *ἀλλὰ περὶ τῶν πηλικῶν ἀμαρτιῶν ἀρχὴ ταῦτα διδάξαι, ὡς δυνατόν δεῖσθαι νεοῖς, καὶ ἀκρῶ γενέσθαι τῷ δακτύλῳ, διὰ σπιτοῦ παραδοσέως.*

F I N I S.

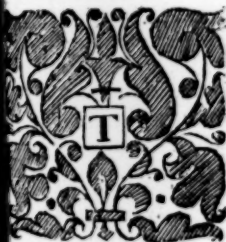


P A R T II.

T I T L E I.

Of Jurisdiction in general.

1. *Jurisdiction defined, and divided, in imperium merum, mixtum & Jurisdictionem simplicem.*
2. *Jurisdiction is either ordinary, or delegat.*
3. *It is either cumulative or privative.*
4. *How a Jurisdiction may be prorogat.*



He Civilians do treat of Jurisdiction very learnedly and profusely, but since most of their Dictats are very remot from our practice in *Scotland*, I resolve to clear only such general terms as are borrowed by our Law from that of the *Romans*.

I. Jurisdiction may be defined to be, a publick power granted to a Magistrat to cognosc upon, and determine Causes, and to put sentences following thereupon in execution, in such way and manner as either his commission, Law, or practise do allow.

Jurisdiction was by the Civil Law divided in *merum imperium*, *mixtum imperium*, & *jurisdictionem simplicem*. *Merum imperium* est habere potestatem gladii ad animadvertendum in facinorosos, & potestates etiam appellatur, *Mixtum imperium* est potestas quæ jure proprio Magistratui competit cui jurisdictione inheret & inest, & dicitur *mixtum* quia cum jurisdictione est conjunctum. *Jurisdictionis simplex* differt secundum Bartolum a mixto imperio in hoc, quod imperium mixtum expediat judicium nobili officio, jurisdictionis judicis ordinario. With us the Justices have only a criminal Jurisdiction, the Lords of Session and Commissars, a meerly civil Jurisdiction, Lords of Regality, and Sheriffs a mixt Jurisdiction, partly Civil, partly Criminal, But in all Jurisdctions, though meerly civil, there is still an innate power, to punish even criminally, such as offend and disturb even the Civil Jurisdiction. Thus the Lords may ordain such as strike any in the Parliament House whilst they sit, or falsify Papers produced before them, or abuse any of their own number, to be degraded, or banished, or to pay a Fyne, or to have their Tongue bored, &c. according to the nature and merit of the offence. For in Law, when any power is granted, every thing is also granted which is necessary for explicating or executing that power.

II. Jurisdiction is divided likewise, in *ordinariam* & *delegatam*, and here it may be doubted, whether the power of Judging crimes which is *merum imperium* can be delegat^d according to the Civil Law it could not, l. 1. & l. 70. ff. de regulis juris, and seeing crimes are of so great concernment, that *industria personarum in electione judicis respicitur*, there is no reason why they should be cognosced by Deputs. Ordinary commissi^on^{ers} with us, also bear a power of delegation which were unnecessary, if the power of delegation were inherent naturally in Jurisdiction. And albeit I have seen Justice deputs delegat others to represent them in the Justice Court, yet this practice seems to want both warrant and reason. And it is observed by

Craig, pag. 192. that *potestatem gladij qui ab alio quam a principe habet nemo potest delegare*: and by Baifour, cap. 63. that a Barron cannot delegat any person to judge in the matter of blood, except the said power be specially allowed him. But the Law allows even to Deputs, though they have no power, to delegat others, a power to appoint another to judge for them in cases of necessary abfence, *l. 1. ff. de off. ejus cui mand.* which Lawyers do also allow, *ex paritate rationis*, to fuch as are fick, Bant. *ibid.* and the reason of both is, leaft the Commonwealth fuffer by their abfence or fickneffe, for it is neceffary that crimes be prefently tryed.

III. Jurisdiction is divided by our Law; *in cumulativam* (for fo we call that Jurisdiction which is competent to feveral Judges, and whereby they may preveen one another, and the Sheriffs, and Barrons have a cumulative Jurisdiction in blood weits) & *privatam* (for fo we call that Jurisdiction which is competent peculiarly to any one Judge.) This diftinction is ufed very much in our Law, and efpecially by Craig, pag. 192. who layes it down as rule, that *omnis curia delegatur tantum cumulative, fed nunquam privative, non eft enim quafi translatio juris ex una persona in alium fed tantum mandata jurisdidio qua non obftante jurisdictione five mandato adhuc remanet in delegante nec minus dominus poft inveftituram vaffallo factam retinet jurisdictionem & curiam quam antea.* And thus albeit His Majefty grant commiffion to a Sheriff, yet he oftentimes appoints other Deputs, as M^r. William Wallace in Edinburgh, Sir Gilbert Stewart in the Sherifdom of Perth. And it was found, that though a prelat had appointed an heretable Bailiff, yet he was not thereby excluded from fitting himfelf, although he was thereby excluded from appointing any other heretable Bailiff; as is obferved by Hadd. 1. February 1610.

IV. Jurisdiction is faid to be prorogit, when a defender does willingly fubmit to the judicatur before which he is cited, though

though otherwayes not altogether competent, & *affirmare judicium*, is to submit to a Judicatory altogether incompetent.

It is a received conclusion amongst Lawyers, that a Delinquent may prorogat his Jurisdiction: who has a Criminal Jurisdiction, but that by an Act of his, as by compearance, and answering before an incompetent Judge, the Delinquent cannot prorogat that Judges Jurisdiction, who has no Criminal Jurisdiction at all, *Clar. quest. 42*. And thus if a man were pursued for Theft before the Commissars, their Decreet would be null, though the Delinquent declined not the Court, but if before a Sheriff, the sentence would be valid, though the Delinquent were not of his Territory; and though he were pursued for a crime to which the Sheriff were not otherwise Judge competent, but a privat delinquent, by prorogating the Judges Jurisdiction, as said is, can only prejudice himself by his own compliance, but cannot prejudice any other Judge of his casuality.

TITLE II.

Of the Judge Competent,
de foro competenti.

In what place may a Delinquent be tryed.

Who is Judge competent, to crimes committed by strangers.

Where are Vagabonds to be pursued.

Who is Judge competent to Ecclesiastick persons.

Prevention amongst Judges competent, explain'd and cleared.

FOR understanding who is Judge competent in general, to punish crimes, and what founds his competency; as the Civil Law and Doctors speak, *quod est forum competentis*; it is fit to know, that he who commits a crime, may be judged either in the place where the crime was committed, which they call, *forum delicti commissi*, or in the place where he was born, which is called *forum originis*, or in the place where he dwells, which is, *forum domicilii*.

The place where the fault was committed, is of all the three the most competent, for it is most just and fit, that crimes should be punished where they were committed, that others who have seen the crime, may by that punishment be
de-

deterred from committing the like; and that the parties injured may be somewhat repair'd, by seeing the Law justly revenged their wrong; and in the place where the crime was committed, accusers can most easily attend; and probation can be soonest and best heard, *Ad 6. P. 6. F. 1.*

Not only where the crime it self was fully committed, may it be tryed, but where any part of it was committed; and therefore a thief may be judg'd, not only where he first broke the House, but by the Judge of that place where he was taken with the things stoln, *Carleval de judiciis*, pag. 156. But the Judge of the place where he was taken, can only proceed against the thief in that case, if he be present, but can not cite him if he be absent; whereas the Judge of the place where the House was broke, may cite him though he be absent: And if the Judge of the place where the House was broke, or the thing was first stoln, pleases, he may require the other to remit him, or send him back to him to be judg'd. But this last would not hold in our practice; for with us wherever a thief is taken with a fang, he may be hang'd; nor is that Judge oblig'd to send him back, except either in the case of prevention, or repledgiation.

There are some crimes which may be committed in several places, and yet be the same crime, as being begun in one place, and perfected in another; and for knowing who is the Judge competent, for trying those crimes, I think we may thus distinguish, either the crime is begun in one place, and perfected in another, both in respect of him who commits the crime, and of him against whom it is committed; as it one should wound a man in one Territory, and should follow and kill him in another, or take away a woman in one Territory and deflower her in another; in which cases, the Judges of either Territory are competent, but so that there is place for prevention, for the scandal is committed in both places, and the peace of both is injured. The other case is, when the

Crime is begun in one place, and perfected in another, only in respect of the committer, as if a man in one Territory should stand and shoot one in another; in which case, the Judges of both Territories are competent; *l. r. C. ubi de crim.* or the crime is begun in one, and perfected in another place, as if a man should in one place, give order that the crime should be committed in another place, or should ratifie in one place, what was committed in another place, and in that case, *Clar. Bar.* and others, are of opinion, that the crime should be tryed only in the place where the crime was consumat, because it is not the giving of the mandāt, or order to commit the crime, but it is the commission of the crime which inters the guilt. But I crave leave to differ from them, and to think that other Judge is competent, and that because oft-times the giving of a mandāt, or order to commit a crime, is of it self a crime; and because he who gave the order, having offended the Jurisdiction where he lived, he ought there to be punished, and the crime committed in the other place, not being his own who gave the order, but because of the order: it must therefore be drawn back to the order, and so he ought to be punished in the place where he gave the order, which should the rather hold with us, that the giving order is art and part, and so in our Law punishable in the same way, as the principal crime.

If any man commit a crime, in the confines of two several Jurisdictions, or Territories, he may be punished in either, though some Lawyers are so subtil, as to conclude, that if a man be murdered in the confines of two Jurisdictions, the murder ought to be tryed in that Jurisdiction, within which the head of the murdered man fell; but if the committer of the crime dwell also in either of the Territories, or if the Judge of either of the Territories be founded upon any other ground of competency, then that Judge who is so founded doubly, ought

ought to be preferred, *quia duo vincula magis stringunt Decian tract. crim. lib. 4. cap. 17.*

II. So well founded is the Judge of the place, where the crime was committed, as to his competency, that some *English* Souldiers having in *Anno 1662.* killed a man in *Edinburgh*, the Justices here were found Judges competent, though it was alledged that they being Souldiers, could only be tryed by a Council of War; and being *English* Souldiers under *English* pay, and a part of the *English* Army, they could only be tryed in *England*, all which was repelled, because the crime was committed here; and it was strange why any of the *English* did think this hard, since they had execute *Queen Mary*, though a Queen: and the Bishop of *Ros*, though an Ambassadour, for alledged Treasons committed in *England*.

The reason why the Judges of that place where the delinquent dwells, is Judge competent to the tryal of the crime, is, because it is fir that the Judge purge his own Land, and Territory, of evil doers and malefactors, lest they affect others by their example, or fall themselves to commit the like crimes there also; and the reason why he who is Judge of the place where the malefactor was born, is Judge competent, is because the malefactor may and will probably return to the place of his Nativity, and it is most reasonable that a man may be Judged as to his life, where he first received life; and Judges ought to consider the life and conversation of the delinquent, which none can do so well, as *judex domicilii*. And therefore these two, *domicilii & originis*, are still equiparat in the Law, and what founds the Jurisdiction of the one, founds oftentimes the Jurisdiction of the other, and their joynt competency may be understood by these conclusions,

First, the Judge of the place where a man dwells, or was born, may beyond all controversie, proceed to take tryal of

the crime committed within their own Territory, if the person be found within the Territory. 2. If he be not found, some think they can proceed if the crime was not committed in their own Territory, but others do more justly distinguish, thus, that either he is pursued by way of accusation, at the instance of a private party, and then *judex domicilii*, is competent, but that neither of these Judges can proceed to enquire into a crime committed without their own Territory; and though the first part of this distinction be very just, because an accuser has alwayes election where to pursue, yet the last part of it may be justly controverted, for these reasons, 1. Because every Judge should endeavour to cleanse his own Land of Malefactors who dwell there, and who may either infect his people, or commit the like crimes, as was said formerly. 2. It would encourage the committers of crimes, if they might go out of their own Territories, and commit crimes elsewhere, and could not be punished upon their return by the Magistrat where they live, whereas it is probable, that the poor party injured could not follow them to a place so far distant. 3. We see that fathers do, and are obliged to punish their children for faults done by them, even without their own family: And a Judge is in Law instead of a father to his own people, and should endeavour that they keep themselves free of all guilt. 4. *Per. l. 1. C. ubi de crim. dicitur quæstiones posse institui apud judicem loci ubi ipsa commissæ sunt, aut loci ubi reus adest.*

And with us, Criminal pursuits are sustained at the instance of the Procurator Fiskal of the Territory where a man dwells, for crimes committed without the Territory, though no privat party inform.

I find likewise that *Calderas* does distinguish thus, if (says he) both the place where the crime was committed, and the place where the delinquent dwells, be under the same Prince, though the Jurisdictions be under different privat Judges, and the privat Territories be different; Yet the Judge of that

place where the Delinquent dwells, may proceed to try a crime committed without his own territory, though the party injured do not insist.

Against which distinction, though it be more plausible than the other distinction, yet the former argument do likewise conclude.

The third conclusion is, that the Judges of the place where the Malefactor dwells, may proceed against him, not only if they find him present, but though he be absent, *l. 1. & authentica in provincia C. ubi de crim.* and by the customs of *Casil.* and *Naples*, *Carlev. num. 747.* and thus the Lords sustained an improbation against *Burghtown* in *July 1672.* though the deed forged concerned an *Irish* Estate, and though *Burghtown* dwelt then in *Ireland*, though he was cited in *Scotland*.

III. Vagabonds may be punished where ever they are apprehended, for having no certain domicile, every place is in *ipsum praedictum* allowed to be their domicile, *Boss. de foro compet. num. 69.* and he is said to be a Vagabond, who has no certain dwelling, *licet habeat domicilium originis*, these our Law calls Dustfoots, and such are our Egyptians, sturdy Beggars, who though they may pretend to have a dwelling, to which they may sometime retire, yet since ordinarily they use to wander, and do things unlawful, they ought to have no benefit by that domicile.

I V. By the Cannon Law, and in all the Romish Church, an Ecclesiastick person cannot be in the first instance judged by the secular Judge, but though this subject might afford matter of curious inquiry, yet I will not dip into it, since the Parliament did in *Anno 1662.* find that Mr. *James Guthrie* might be tried by the Parliament in the first instance, for words spoken by him in Pulpit. And as a Minister, albeit he alledged that this Doctrine should have been tried, first by a Church Judge, for the Parliament thought that this might give too great liberty to Ministers, and might encourage them by adhering to

one another, to enveigh against, and disturb the Civil Government at their pleasure: for if Ecclesiastick persons could not be Judged by the secular power, till first the Church Judicatur did consider the Doctrine; then if these Church Judicatur did approve the Doctrine, it could not thereafter be found Treason, or any other crime.

V. Where many Judges are competent, they may prevent one another, and prevention is defyned to be *anticipatio sive praoccupatio usus jurisdictionis alicujus judicis circa causam aliquam, antequam alius iudex circa eam jurisdictione utatur*, Prevention is, when one Judge interposes his authority, or when a tryal is entered upon by one Judge, before another Judge do exercise any action of Jurisdiction about that subject.

Prevention may be made, either by the Judge, or by the Party. And prevention is not inferred by raising of a Libel without citation, *Decian: lib. 4. cap. 21.* but it is inferred by a citation, or by the first citation in writ, where moe citations are requisit and by apprehending the Malefactor, because, as *Carleval. de judiciis, num. 881.* observes, deeds are stronger preventions then word or writ. Prevention is likewise inferred by the receiving of witnesses in order to an inquisition, *ibid.*

It seems that the allowed and stated deeds, from which prevention is inferred by our Law, are only these which are enumerated by the 29. *Act 11. Parl. K. F. 6. viz.* apprehending of the offenders person, and executing a Summonds against him, to underlay the Law, and therefore no mention being there made of receiving of witnesses, or inquisition, it appears that these are not sufficient to infer prevention in our Law.

In the competition of thir preventions, when one Judge has done one deed, and another Judge has done another, the ordinary conclusions for peference are, 1. That when one Judge uses first real citations, that is to say, apprehends the offender, and the other a verbal, or citation by writ, the real is preferred. 2. When the one does at the same time use a real,

by capture, and the other a written citation, he who has taken the Malefactor is preferred. 3. Where the one has first used the citation, and the other has apprehended the Delinquent, though many Lawyers do prefer the Judge who apprehended, yet the Judge who first cited, will be preferred in our Law: and if a citation be a way of prevention, as was said formerly, I see not why the *jus quasitum*, by that prevention, can be thereafter taken away; for though it may be pretended, that Judges would be thus encouraged to take Malefactors, which is a greater benefit, then the citing them is; Yet I think it is the duty of all Judges, to concur to take Malefactors, though cited by other Judges; and yet by the foresaid Statute, the Judge who apprehends the Malefactor, before the other cite him, does prevent the citer.

It is agreed to by the Doctors, that when two competent Judges do both proceed to a tryal, and both are equally founded in their Jurisdiction and diligence, that then he who pursues for the greatest crime, ought first, to proceed in his tryal, because the Common-wealth is more concerned to have a great crime punished, then a small crime, which they extend not only where the crimes are different, but even where the one is aggraved by more atrocious circumstances then the other; as if the one should pursue for wounding, and the other for wounding in the night, or in an ambush, *Boß. huc. tit. num. 102.* And he who prevents by citing one of many complices, doth prevent *quo ad* all. As also he who once cites him who gave order to commit a crime, doth likewise prevent all Judges, *quo ad* the Committer. Because it is fit that the cognition of the crime be not divided, and ordinarily the defences are common defences, *Boß. num. 109.* But I think this conclusion should not hold, except the other Judge be presently ready to pursue, for it is the interest of the Common-wealth, that crimes be speedily punished.

Though a Judge competent have once fixed his proceffe by prevent on

vention, yet if thereafter he be *in mora*, the other Judge, who has a cumulative Jurisdiction with him, may proceed; for hereby it appears, that by prevention he has designed to exclude the other Judge, meerly in collusion with the delinquent, *verum. 9. 1672. Scot contra Riddel.*

If Prevention be not proponed either by the Party, or the Judge, the process and sentence will be valid, though led before the Judge that was prevented.

When Judges ought to remit delinquents to others who are more competent is fully set down, *Title Regalities.*

TITLE

TITLE III.

Jurisdiction of the Parliament in Crimes.

1. *The Parliament are Judges competent to the tryal of Crimes, even where the Pannel is absent.*
2. *Forefeitures in Parliament cannot be quarrelled before any Inferiour Judge.*
3. *Whether Decrets pronounced by Commissioners of Parliament can be quarrelled by any Inferiour Judicatory.*

1. **S**ince the Parliament is the Supream Judicatory, it may certainly cognosce all Causes, in the first instance. And of old, if a person accused for treason did absent himself, the Criminal Court, nor no other Inferiour Court could proceed to take tryal by probation against him, and so all they could do, was only to denounce him fugitive for his absence, upon which denunciation his escheat did only fall, but he could not be forefeited; and therefore since it was unjust that he should by his own absence procure to himself an impunity and exemption from forefeiture, the Parliament did by their supream power cite the person guilty, to appear before them, and did lead probation in absence against him, and forefeited him in absence, though guilty. But it being found inconvenient that Parliaments behooved either to be called, or such Delinquents pass unpunished, therefore by the 11. *Act 2, Parl. Ch.*

Jurisdiction of the Parliament in Crimes. 365

It is Statuted, that the Justices may proceed to try Crimes by probation, even when the person cited is absent; *in cases of treasonable rising in Arms, and open and manifest rebellion against his Majesty, or his Successors and their Authority:* So that the Parliament are yet only Judges to the tryal of all Crimes by probation against absents, except only Perduellion, or open and manifest treason. And albeit it may seem strange that the Justices should have been allowed to lead probation against absents, in this which is the greatest of Crimes, and not in Crimes of lesser importance, yet this proceeded from the just detestation which the Parliament had of this Crime, and that the punishment thereof might not be delayed, where the delay might prove so dangerous.

II. If the Parliament forfeit any person after cognition of the Cause, their sentence cannot be quarrelled by any Inferiour Judge, *Act 39. Parl. 11. R. 7. 6.* And though it be added to that Act, that no forfeiture lawfully and orderly led in Parliament shall be quarrelled by any Inferiour Judicatory; for these words, *Lawfully and orderly led*, seem unnecessary, since after cognition of the cause by the Parliament, no Inferiour Judicatory can quarrel a Decreet of Parliament, even though it be pretended that the said Decreet was not lawful and orderly: yet if a person be only denounced Fugitive by the Parliament, the Lords of the Session may suspend that case, if the Process was not orderly led; but whether they can reduce, even in that case, *est altioris indagationis*. And some think, that though it were very inconvenient that such a Decreet should receive present execution, where possibly the party was not lawfully cited; yet that such respect is to be payed to the Parliament, as that the illegality of that procedure before them, though not objected before sentence, should remain undecided till the next Session of Parliament.

III. If the Parliament should remit any such Process for Crimes, to any of their own number, to be decided finally before

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fore them, it hath been doubted whether their decisions could be reduced by the Session : And this Act of Parliament reaches only to decisions in Parliament. But yet since Decrees pronounced by Commissioners of Parliament, are reputed with the Decrees of Parliament, and since Decrees pronounced by Commissioners, for valuation of Teinds, are not reducible, because these Decrees are reputed Decrees of Parliament, as being pronounced by such Commissioners of Parliament; it seems that Decrees pronounced by such Commissioners, in Crimes, after probation, could not be quarrelled and reduced by the Session, or other Interiour Judicatories,

TITL

TITLE IV.

The Jurisdiction of the High-Constable in Crminals.

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1. *The Original of the word Constable, and his power.*
 2. *The Office of petty Constables.*
 3. *The Jurisdiction of those who are Constables of His Majesties Castles.*

1. Some describe the word *Constable*, from the word *Conning*, which signifies a King; and *Staple*, which signifies a *Stay* or *Hold* in the *Saxon* language, because Constabularies were only erected in those places where the King kept House; and thus the Constable was judge of old, to all crimes committed within twelve Leagues of the Kings House, and Habitation, *l. Malcol. c. 6.* Though *Skeen* there observes, that the best Manuscripts bear only two Leagues, or four Scots Miles. Our *Craig*, and other Authors, derive the word *Constable*, from the *Comes stabuli*, under the Roman Empire, nam *Constabularius* (sayes he) *nihil aliud est nisi prefectus aquitum*, since the Reign of King *Robert the Bruce*, this Office of High-constable, stands heretably in the noble Family of *Errol*: and their being some debates concerning his Jurisdiction, *Francis Earle of Errol*, obtained Commission

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under the great Seal, dated the 23. of *Jun* 1630. Seal'd *per*
mult *March* 1631. to the Persons therein specified, or any
 nine of them, empowering them to search the Acts of Parli-
 ament, *consuetude*, Monuments and Registers of the King-
 dom, and all Evidents that the Earle of *Errol*, or the Lord
Hay his Son, should produce concerning their Honours, Hos-
 tilities, Priviledges, and Immunities belonging, or which
 had belonged to the Office of Constabulary, from the first
 institution thereof: This Commission I have seen, with the
 report thereof, dated the 27 of *July* 1631. bearing the Com-
 missioners to have met with the Earle of *Errol*, and his said
 Son, and to have considered their Instructions, Warrants,
 and Customes of other Countreys, anent the Constables Pri-
 vledge, and in the third Article of the report (which relates
 to the Criminal Jurisdiction only here treated of) they set
 down these words, *The Constable is Supream in all matters of*
Ryot, Disorder, Blood, and Slaughter committed within four
Myles of the Kings Person, or of the Parliament, or Council re-
presenting the Royal Authority in his absence, and that also with
within the Court, as outwith the same. And the tryal and
 punishment of such crimes and offences, is proper and due to
 the Constable and his Deputs, and the Provost and Bailies
 of that Centre or Burgh, and all other Judges within
 the bounds, where the said facts are committed, are ob-
 liedged to ride, concurr, fortifie and assist the Constable
 and his Deputs, in taking the saids Malefactors, and to make
 their Tolbooth patent for receiving them therein. As was clea-
 rly evident, by producion of Warrants granted by His Ma-
 jesties Predecessors to that effect: and which likewise appea-
 red by the Exhibition of certain Bonds made by the Town of
Edinburgh to the Constable, for the time, concerning that
 purpose, the King having seen this report, did approve it
 in a Letter directed to His Secret Council of this Kingdom
 from the Court at *Theobals*, the 11. of *May* 1633. Regi-

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II. Ou

strat in the Books of Secret Council, the 15. day of that Moneth, and in the Commission report, and Letter foresaid, the Constable is designed High-constable, and his Office the High-office of Constabulary.

The Constable is still in use since that time, to judge Riots within the bounds foresaid, and to interrupt the Town of *Edinburgh*, when he knows of their medling, providing the Riots be committed in time of Parliament: and I was told, that in time of Parliament holden at *Edinburgh*, Anno 1640. and 1641. the Earle of *Errol* was found by the Lords of Secret Council, to have the sole criminal Jurisdiction, and did repledge

servant to Sir *Thomas Nicolson*, the Kings Advocat, arraigned before the Magistrats of *Edinburgh* for a Slaughter, and Assailzied him upon production of a Remission. And upon the 5. of September 1672. *Gilbert* Earle of *Errol*, did repledge *James Johnston* Violer, arraigned before the Magistrats of *Edinburgh* (as Sheriffs within themselves). for stabbing of his Wite the day before *Easter*, the Magistrats had taken his judicial confession, and summoned the Assize: there was no formal repledgiation, because the Magistrats passed from him upon the Constables application, and upon the 6. of that Moneth of September, the Constables Députés sentenced him to be hang'd, and to have his right hand, which gave the stroak, cut off, and affixed upon *Lieth-wind* Port, and ordained the Magistrats of *Edinburgh* to cause put the sentence to execution upon the 9. of that Moneth.

Likeas, the Coach-man of a Noble-man, having about the same time wounded a Child, the Constable commanded the Towns Guards to apprehend the Delinquent, which they accordingly did, till he was freed by a Remission.

II. Out of this high Magistracy of Constable (sayes *Lambert*

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bert an *English Lawyer*) were drawn those inferiour Constables of hundreds, which Office we borrowed from them, and they are with us subservient to the Justices of Peace, and are to be chosen by them two out of every Paroch, and as many in Towns as may be proportional to the greatnesse thereof; and they have power to apprehend all suspicious, idle, or guilty persons, and may require the neighbours to assist them; and if the guilty persons flee, they may require the master of the house to make open doors: all which, with many other particulars are entrusted to them, by the 38. *Act*. 1. *Parl.* *Ch.* the 2.

III. His *Majesties* Predecessors used of old, to build Castles in the considerable Towns of the Kingdom, and for preserving the Peace both in that Town, and in the adjacent Countrey; and the Governours of those Castles were called *Constables*, though they were more properly *Castellains*, or *Chastellains*, as the *English Lawyers* observe, these had the power of riding the Fairs, and having had the Keys of the Tolbooth delivered to them, they exercised a criminal jurisdiction, during those Fairs: but it was found, that this jurisdiction did not extend to Fairs that were granted posterior to the Office of Constabulary, nor to the customes thereof, as was found the 18. of *July* 1676. betwixt the Earl of *Kinghorn*, and the Town of *Forfar*; but these Offices depend absolutely upon prescription, use, or custome, which either extinguisheth, or limits them more variously: but because those Constables use to extort customes at those Fairs, it is therefore appointed by the 60. and 61. *Acts* 13. *Parl.* *Ja.* 2. that the Constable shall not exact any such customes, except his *Festment* bear him thereto, and that old use and custome shall not be sufficient. Which *Acts* are ratified, by the 33. *Act* 5. *Parl.* *Ja.* 3. But if the Infestment in the general bear, *own* for

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de & devorin, &c. Possession by vertue of that general Right, will be found sufficient, though the particular Casualties be not exprest in the Infeftment, as was found in the former case, betwixt the Earle of *Kinghorn*, and the Town of *Forfar*,

This Officer was amongst the *Athenians*, call'd *επαγγοι*.

TITLE

TITLE V.

The Jurisdiction competent to the
High Chamberlain, and
Magistrats of Burghs
Royal.

THe Chamberlain was an office to whom belonged the judging of all Crimes committed within Burgh, and he was in effect Justice-general over the Burrows, and was to hold Chamberlain-Airs every year for that effect; the form whereof is set down in *Reg. Maj.* in a Book intituled the Chamberlain-Air, *Iter Camerarii*, he was a Supream Judge, nor could his Decrees be questioned by any Interiour Judiciary, *Iter. Cam. cap. 35.* and his sentences were to be put to execution by Bailiffs of Burghs, *ibid. cap. 37.* he made the prices of all Victual within Burgh, *cap. 33.* and of these who wrought in the Mint-house, *Statute Da. 2. cap. 38.*

He is called *Camerarius à Camera*, (*id est. testudine sive fornice,*) *quia custodit pecunias qua in Cameris precipue reservantur.*

This office belonged heretably to the Duke of *Lennox*, but its priviledges are by his absence run in desuetude: Magistrats of Burghs, as such, have no Jurisdiction but what is competent by their Charter of erection, wherein ordinarily they have power of Pit and Gallows; but sometimes they are Justices within themselves, as *Edinburgh*, who have right also to all eschears

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escheats of their own Burgeses, or other Criminals judged by them, for crimes committed within their own Burgh: Sometimes they are Sheriffs within themselves, and ordinarily they are Justices of peace within their own Jurisdiction.

The King may erect a Burgh Royal within the bounds of another Jurisdiction, as of a Regality; but in that case, though the Lord of Regality consent to the erection, yet it will not prejudge the Bailie of Regality, whose Right of Bailiery was constitute, prior to the erection of the Casualties, that were formerly due to him: albeit it was alledged that the Lord of Regality might dissolve, and dismember that part from the Regality, without the Bailies consent; and so it not being in the Regality, it could not be subject to the Bailiery, the 27. of February 1666. Lord Colvil *contra* the Town of Culrofs.

TITLE

TITLE VI.

The Jurisdiction of His Majesties Privy Council in Criminals.

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1. *In what consists the Jurisdiction of the Council, their President and number.*
 2. *Their procedur in punishing Ryots.*
 3. *Whether a power to eject, be a sufficient defence against a Ryot.*
 4. *The punishment of Riots.*
 5. *Precognitions fully considered.*
 6. *The Council name Assessors to the Justices, and sometimes review their Sentences.*
 7. *They grant Letters of Intercommuning, and Commisissions for Fire and Sword.*
 8. *They sometimes ordain Houses to be delivered, under pain of Treason.*

I. **T**HE Affairs of this, as of all other Nations, are either such as concern the policy of the Kingdom in general, or such as respect the distributing of Justice between privat parties; the policy or government of the Kingdom

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is regulated by His *Majesties* Privy Council, in which the Chancellor is President, if he be present, but in his absence, the President of the Council precedes. This Office of Precedent of the Council is a distinct imployment, and it gives him the precedency from all the Nobility. The number of this Judicator is not definit, depending upon His *Majesties* Commission, but all the Officers of State are Members of it, *rati-que officii*, it has its own Signet, and its Letters pass by a Bill, subscribed by any one of the Council: upon which warrant, the Letters are in their several forms, extended and subscribed by the Clerk of the Council; and they bear also to be, *ex deliberatione Dominorum Secreti Consilii*, they must be execute, at least upon six free dayes, and a full Copy must be given, because all dyets here are peremptory, and not with continuation of dayes; the reason whereof, is, *ut reus veniat instructus ad defendendum*, whereas before the Session, a short Copy is sufficient, because the Summonds is given out to see, and a time allowed to answer: The dyets are here so peremptory, that if the defender be cited to a day, whereupon the Council sits not, if he appear at the day, to which he is cited, and take Instruments at the Council Chamber, he will not be thereafter obliged to attend, nor can he be denounced Fugitive for being absent; for seeing it is peremptory against him, it is reasonable that it should be peremptory for him.

Where many parties are cited as defenders, upon a Bill to the Council, any one or two will be allowed to answer for the rest, they finding caution, and enacting themselves to be lyable for whatever shall be discerned against those, for whom they undertake; which priviledge is granted if no personal punishment be concluded against the defenders; but if either the complaint conclude, or that the crime will in Law infer a corporal punishment; then the offering to find caution to answer, will not be allowed, *nam noxa caput sequi debet*, and no

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man can bind his body for another, *nam nemo est dominus suorum membrorum*, the pursuer may appear by his Procurator; but the defender must either be present, or send a testification of his sicknesse, upon Soul and Conscience: And yet it is the privilege of any Councellour, that he may undertake to answer for any defender that is cited, *quo casu*, the defender will not be unawed, or denounced fugitive upon his absence, but his defences will be received, as if he were present; nor can any Bill for receiving a complaint, passe against a Councellor, but *in presentia*.

The Council by the first constitution, were only to take cognizance of what concerned the publick Peace, and were neither Judges in civil cases, nor crimes, but in so far as these impinged upon, or were violations thereof: but now that Judicator doth under the notion of Riots, and breaches of the publick Peace, hear to many causes Civil and Criminal. But seeing the design of this Treatise, aimes only to illustrate our criminal Law; I shall only consider the procedor of the Council, in so far as they can cognosce upon crimes.

II. The most ordinar crimes which are punished by the Council, are these, which we call Riots in our Law. A Riot is a breach of the Peace, committed by oppression, or wronging His *Majesties* Lieges, by force and violence; instances whereof, are the dispossessing any of His *Majesties* Subjects, by a convocation of the Liedges, or otherwise; the affronting of Magistrates, by raising tumults against them, &c.

For the better understanding of which crime, it will be fit to consider, that *jura maxime oderunt violentias & rapinas & pluribus modis succurrunt vim passis & spoliatis*, for here the publick is wounded, in breaking its Peace, and private persons are wronged, by the prejudice done. Upon which account, the Law hath furnished more remedies against this, than any other crime; for either it may be pursued civilly, *per in-*

terdictum

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interdictum unde vi, so call'd from the first words of the Edict, which runs thus, *unde vi tu illum deiecisti te restituere cogam*, which interdict, restor'd only the possession of immoveables; whereas moveables being spoil'd, were crav'd back, *actio in vi bonorum*. *Justinian*, also introduced, that he who rest, and violently took what was his own, should lose it, *l. 7. unde vi*, for in this the resumer usurps the power of the Magistrat, whose ministry is requisit, in inverting the present possession. The Canon Law likewise hath introduced, *beneficium*, *cap. redinta granda 4. cap. 3. quest. 1.* and *Menoch* relates 17. remedies, and *Philip. Franc.* 24. for recovery of possession; and seeing the thing possess'd, is still presumed to belong to the possessor; and that hardly the right of moveables can be otherwise proved, then by possession: the Law did most reasonably, both for securing Property, and punishing Violence, establish that great rule, that *Spoliatus est ante omnia restituendus*, and conform thereto, the Council who are never Judges to Property, but only to Possession, so that in effect, all their sentences, are interdicts do still restore the possession to the person ejected; and likewise punish arbitrarily the violence committed, for we have no expresse Statute taxing the punishment. By the Law of *England* it is accounted no Riot, or routs except three at least were present, and that something was done, *ad terrorem populi*, for breaking of the Peace, *Bolton. cap. 31.*

III. The two ordinar defences, which are propon'd against riotous ejections, are, that by a Writ it was lawful, and agreed upon betwixt parties, that the defender might have ejected the pursuer, if he removed not at the day appointed, which will defend against a Riot: and yet *Craig* relates a case, *l. 198.* where one who had granted a Tack only for a Year, having ejected the Tack man, after expiring of that Year, was pursued, *actio unde vi*, in an action of ejection, and was forced to transact, albeit he contended, that the word

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(only) was exclusive of any future possession; but where by expresse paction, it is declared lawful for him who enters, to enter *brevi manu*, without proceffe, or hazard of ejection, it would appear, that this paction is unlawful; seeing no man can warrand violence, and this seems as unlawful, as if one should oblige himself, never to pursue for any injury to be done him: which paction, the Law declares expressly unlawful, & *nemo potest renunciare juri publico*; and this were to allow privat persons the power of Jurisdiction: Nor can it be thought, but this paction was extorted; and albeit the party injured, were excluded by this paction, yet His Majesty's Advocat may certainly pursue, *vindictam publicam*, if opposition was made, and violence used: Notwithstanding which, I remember that the Earl of Argyle having obtained a Decreet of removing against George Campbel, and it being suspended till the next Term, the Lords ordained it to be inserted in the Bill, that the Earl might eject him, *brevi manu* the next day after the Term, by his own authority; but the Earl was Sheriff here himself, and so his Jurisdiction was only prorogat, and the Law is expresse, that *privatus potest consensu prorogare jurisdictionem ejus qui aliqualem habet*, *sed non potest privatus consensus tribuere jurisdictionem ei qui nullam habet vid. Hanc questionem, apud Barr. ad l. creditoris C. de pign. & hypoth.* But here also, the Lords warrand to eject, was a delegating of their own Jurisdiction.

I conceive also, that where there is no violence, nor opposition made, the voluntar consent may allow the ejection, especially in a Master, towards his own Tenant, who hath a natural Jurisdiction in that case; and that his ejection is also allowable, if the Tenant should compt, oblige himself to remove, and declare that it should be lawful to his Master to enter, *brevi manu*, if he pay what is declared to be due; for there the preceeding compt is equivalent to a declarator, and the party ejected is not per-

judg'd otherwise then by his own not payment: And therefore the Lords, the 19. of December 1661. found not the Countesse of Murray lyable to aspoilzie, for ejecting *Demer* her Tennent, because *Demer* had by a compt declared that he was debtor, in such a sum, and by a bond oblidge'd himself to remove, betwixt and a particular day, and if he fail'd, declared it should be lawful for the Countess to enter, *brevi manu*, to the possession. By the Civil Law, he who violently intromitted, even with what was his own, lost thereby his property in it.

The next defence is, that the pursuer had immediatly before, posselt himself violently, and it was lawful for the defender, to recover his possession, *ex incontinenti, nam vim illicet repellere*, and the Law sustains this defence, l. 3. s. 9. & l. 17. ff. *cod.* and explains that to be, *ex incontinenti factum quod factum est priusquam ad aliud negotium fuerit recessum*, what time should be allowed for repelling violence, is arbitrary to the Judge; for violence committed by a great man, requires more time for reparations to redress it, then when it is committed by a privat person, for friends must be convocat, and arms prepared, as *Bart.* and the *Glos.* instances upon the former Law: But in personal injuries, *id tantum dicitur ex incontinenti fieri quod sit in ipso flagranti crimine.*

IV. The violent ejection of His Majesties Liedges, out of their possession, is pursued, either by an action meerly civil, which in moveables is called spoilzie, in Lands ejection (which the Civil Law terms still, *dejectio & non ejectio*) or criminal, as a Riot, which is a mixt action, partly civil, partly criminal. When spoilzies, or ejections are civilly pursued, the conclusion is violent profits (which is the double Rent of the Lands, and restitution of the thing craved: But when this is pursued as a Riot, the punishment is arbitrary, as also the criminal punishment, The civil action prescribes in three Years, *K. Ja. 6. Parl. 6. cap. 8.* But the action of Riot

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ryot or Criminal Action prescribes not; and yet it may be doubted, if these Actions prescribe not, *quo ad*, the conclusion of restitution, seeing that is a civil conclusion; and it may be debated, that the maxim, *spoliatus ante omnia est restituendus* loses its vigor after that time, so that one pursued for a ryotous ejection, or spoilzie, may alledge that no ryot can be concluded, seeing the thing or land controverted was his own. We shall speak of the Criminal pursuite in its own place.

Whether the one of these actions doth exclude the pursuer from all other reparations, so that he who pursues the action of spoilzie, or ejection, cannot thereafter pursue a ryot, or a criminal pursuit, may be controverted; and the Civil Law decides it thus, that *quando & una & altera tendunt ad vindictam tunc una agitur ad vindictam altera vero ad prosecutionem rei familiaris*: and thus the having obtained a Decreet of ejection, impedes not the pursuer to intent an action or Criminal pursuit; but after a Decreet obtained for the ryot, a criminal pursuit cannot be intended for these, *respiciunt vindictam*.

V. The Council cognosces likewise upon Crimes, by way of precognition, which they do in two cases, 1. Where considerable persons are interestd in the crimes committed, as Noble men, or Clanns, where there is a hazard of alimenterg the feuds, by remitting the criminals to the ordinary course of Justice: Wherefore to prevent future resentments, and cement old differences, the Council *in quorum tutela est pars publica*, cognosces upon the crime, and remit much of the ordinary rigor.

The 2. case is, when the crime is so circumstantiat, that it requires *mitigatio*, and lessening of the ordinary punishment. The formes in precognitions are, that either the friends of the parties give in a Bill to the Council (which cannot be granted but *in presentia*) deducing the case, and representing what danger is like to ensue, *quo casu*, Letters are directed ordaining the other party to be cited, and both parties to cite

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such witnesses, and probation, as they will use, or else if no application be made, the Council ordains Letters to be direct, citing both parties. His Majesty having with consent of Parliament appointed that the Justice-court should be served by many of the Lords of Session, did, because of their number and ability, discharge all precognition in their Commission, and yet because these precognitions were not discharged in the Commission granted to the Council, the Council did sustain themselves Judges competent to precognitions, their Commission bearing to be as full, and to give them as much power as any former Council had. But really it were happy for this Nation, that we wanted all precognitions, since thereby the Delinquent has power to choose such dyets as he pleases, and so may pursue his precognition when he knows the witnesses who could prove his guilt are absent, or may prevail with them to absent themselves for some time; and this is ordinarily practized. Nor have I ever seen any who pursued a precognition brought to condigne punishment; and whereas it is pretended that there are some cases wherein the severity of Law ought to be remitted, upon the considerations of lessening circumstances, wherein equity may be allowed to blunt the edge of Justice. It is answered, that this may be done by the Justices, either upon a special commission for trying the merits of the Pannels pretences, or after that the Justices have heard all that will be legally urged by either party, in full tryal they may delay the execution, and make report to His Majesty of the just state of the case.

The Council likewise sometimes inflict punishments without recognition, by way of citation, as in the case of *Giles Thyre English man*, who being incarcerated as accessory to the death of Mr. Bedford in *Lieth*, and as guilty of Adultery with *Mistress Hamiltoun*, wife to the said Bedford, Thyre did upon a petition to the Council, wherein he confessed the Adultery, but denied the murder, (which

Mistress

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Mistress *Hamilton* had likewise at her death acquit him of obtain himself banished, without being put to the knowledge of an Inquest, by whom he had certainly dyed, as guilty of notour Adultery, 1665.

V I. The Council name likewise Assessors to the Justices before the tryal, these the Grecian Lawyers call'd *magistri*. And sometimes they discharge or continuedyers.

After sentences also, the Council, upon application made to them, do either mitigat the punishment, not only where it is arbitrary, but even where it is statutory, as in the case of *Brown*, whom they ordained only to pay 100. Merks, though she was found guilty of nottour adultery, which is death by our Law. Sometimes they ordain no sentence to follow upon the verdict of an inquest, as in the case of *Purdy*, who was condemned for Usury, in so far as he had taken Annualrent a month before the term of payment, upon his Debtors voluntar offer; And sometimes they ordain some of their own number to revise the proccesse and verdict; Which Assessors do reverse the whole Process, and ordain it to be torn out of the Criminal Registers, as in the case of *George Grahame*, who being pursued for theft; it was alledged that the Assize had found him guilty of receipt, and so the verdict was found disconform to the Libel, and consequently the whole process was null. Yet when Mr. *William Somervel* was found guilty of Murder, upon the deposition of one witnesse, the Council refused to review the verdict, as unwarrantable; for they found that they could not quarrel an Assize, which condemned, seeing Assizers can only be quarrelled for error, when they assize. And when his Advocat cited to them the 47. *Ed. 3. c. 6. K. 74. the 3.* Whereby it is ordered, that where a party finds himself grieved by an Assize, by partial malice, or ignorance, it shall be lawful to him to cite them before the Council, and if the error be proved, the party shall be restored to the

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the condition he was in before the sentence. To this it was answered, that this Act speaks only of Civil cases, and that by the Council here, is meant the Session: To which it was replied, the Rubrick and Act are general, and treats of all persons wronged, & *qui totum dicit nihil excipit*: And the reason of the Law is comprehensive of both. ——— From all this some do conclude, that if the Justices erre in judging the relevancy, or if the Assize find that proved which was not remitted to them, that in either of these cases the Council may review the sentence, but that they cannot quarrel the sentence, upon the accompt that the verdict is not sufficiently warranted by the probation.

Sometimes also the Justices are concluded by the Decree of the Secret Council, which is repeated to the Assize as full probation; So that the Justices have only the execution of their sentence remitted to them: Thus *Fleeming* was convicted before the Council, of having uttered most disdainful speeches against the King, and therefore was remitted to the Justices to be exemplarily punished; and upon production of their Decree (which Decree is still exprest in the dittay) he was hanged, 17. May, 1615.

VII. If the Law cannot receive full execution and obedience, *via ordinaria*, by the Criminal sentence, then the Council upon production of Letters of Horning, following upon any Criminal sentence, and duely execute and registrat, use to grant Letters of Intercomuning, whereby all His Majesties Ledges are prohibit to intercomune with any of the Rebels to denounced, which Letters must be published at all the Mercat-crosses of the Shyrs, and Jurisdctions within which such persons reside, whose intercomuning is suspected, and registrat there: And if need be, the Council will likewise grant a commission for Fire and Sword, to such persons as they will name, against the persons who are disobedient in the Criminal Letters, as said is: And ordinarily thir commissions of Fire and Sword

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are given to the persons interestted, which occasions many great abuses. And these commissions are sometimes granted against parties who were never cited, but upon a naked complaint exhibit to the Council, which is most irregular.

The Council do sometimes grant commission to bring in parties dead or alive, and that upon naked Petitions, without any previous tryal, as they did against the Laird of *Dinbaith*, upon a Petition, wherein it was represented, that he had run away with the publick money delivered to him by the Shire, for paying their Cesse and Excise; But this seems hard, and it were to execute a free Subject before he be heard, or sentence pronounced against him: for these privat petitions may be most unwarrantably founded.

VIII. If any person keep out his House in Garrison against his Majesty, the Council first uses to issue out Letters against him, to deliver up his house, under pain of treason; and they ordain a Herald to go and summond him for that effect, and if he refuse, they ordain him to be proccessed before the Justice-general, and do immediatly, before any criminal sentence, grant a commission of Fire and Sword against him, as in the case of *Burgie, June, 1668.*

They used likewise of old to ordain Noble-men and others, who could not be apprehended by Captions, for civil Debts, to deliver up their persons in any of his Majesties Castles, under the pain of treason; which though, it be now indefuetude, yet it was most reasonable, and of excellent use, seeing it is most absurd that any of his Majesties Liedges should contemn his Laws, and that such poor persons as pay his Majesties Taxes and Impositions, and who are obliged to venture their lives for him, should not likewise have the assistance, as well as the protection of his Laws. So that when the ordinar remedies of Caption, Compyring and others fail, these and other extraordinary remedies should be allowed, untill his Majesties Laws be obeyed, and the party so injured be fully and finally repaired.

TITLE VII.

Of the Exchequers Jurisdiction
in Criminals.

THE Exchequer are only His *Majesties* Chamberlains, and have no Jurisdiction in criminals; and yet they fine, and confiscat such as transgresse pecunial Statutes, or wrong His *Majesties* Rents; *quo casu*, they do in effect judge crimes: for it is a crime to abstract customes, or cheat the publick; and without this Jurisdiction they could not manage His *Majesties* Rents; so that this is *jurisdictio emanata*, founded upon that rule, *quando aliquid conceditur omnia concessa videntur sine quibus hoc explicari nequit*, but it seems, *de iure*, they should not, even *eo casu*, cognosce: for by the 9. *Art.*, 1. *Parl. Fa.* 6. It is statute, that such as commit fraud, in transporting forbidden Goods, shall be punished at Justice Aiers, at least the Justice of the Peace.

I remember that in July 1668. the Exchequer did fine a very intilligent Person, for filling up a blank Signature, subscribed by the King, and ordain'd to be filled up by the Exchequer: which some thought irregular: for either he had committed a Crime, *& eo casu*, he should have been committed to the Justices, or if he had committed none, he could not have been fined. And albeit the Exchequer, or any other Court may fine, or imprison such as injure their Jurisdiction, they may ordain dammage and interest to be repayed to the party injured, in any thing before their Court; yet no person having been prejudged, and the injury having gone no further,

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then à *simplex conatus*, there could be no damage and interest incurred. But it seems the Exchequer are still Judges, in *criminibus repetundarum & de residuis*

The Commissioners of the Thelaury did, in June 1669. ordain two Skippers in *Bruntisland*, to be scourged at that Mercat Cross: because, when a Customer came to enter a Boat wherein unfree Goods were were alleged to be, they did put off the Boat from the Rock where it lay, whereby the Customer fell into the Sea, and had almost drowned.

TITLE VIII.

Of the Jurisdiction of the Lords of Session, in Crimnials.

1. *The Lords of Session use to pass Bills for Criminal Letters*
2. *They Advocate Causes belonging to the Justice Court,*
3. *They are Judges, in crimine falsi.*
4. *They have made Statutes for regulating the Justice Court.*
5. *Whether they can review the Sentences of the Justice Court.*
6. *They suspend the Sentences of the Justice Court.*
7. *They are Judges to such as kill, or wound one another, during the dependence of a Proccesse before the Session.*

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8. *They grant Warrant to Advocats, to compare for [such as are pursued for Treason.*

I. **T**HE Lords of Session have regularly no jurisdiction in criminals; and yet they pass the Bills wherupon all criminal Summonds are raised: For all Summonds in criminals must have a Bill, which must pass under the Hand of His *Majesties* Advocat, and for which he gets ten Merks, and his servant one, therafter it is carried to the ordinar upon the Bills, and is subscribed by him as a common Bill.

The reason, why thir Bills are past by the Lords, seems to be, because the Justice-deputs were not ordinar residents in Town (their salaries not being sufficient for defraying that charge) or else, because the Clerk of the Bills is a Member and Servant of the Colledge of Justice; yet this was one of the grievances given in by the Justices to the Parliament, *Anno 1662.* And it is very unreasonable that those whose employment it is to understand criminal cases, should not have the passing of these Bills; and many of the Lords refuse to pass these Bills, whereby the Liedges are prejudged. And it is most unreasonable, that the Justices should not know what they are to judge; especially this warrant being a part of the Process, and so falls naturally under the cognition of these who are Judges to it. And it is probable, that if any of the Justices would pass their own Bill, it would sustain. But now the Justices use ordinarily to pass their own Bills: because the Justices are now of the Session: but still other Lords who are not Justices, may pass such Bills.

But albeit these Lores cannot judge crimes, yet they may and do punish injuries committed against any of their own Members, by fining or confining.

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I I. They likewise Advocat Cause, from the inferior Courts to the Justices: thus in *Anno 1664. Mackintosh*, being pursued before the Sheriff of *Inverness* for theft-boot, they Advocated the cause to the Justices, albeit it was alleged, that they could not be Judges to the Cognition. To which it was answered, that the consequence was ill inferred; for the Council did Advocat, and could not cognosce; and the Lords of Session did Advocat Breivs, for serving Airs, and yet they were not Judges themselves; for both in this, and that case, an Inquest was necessar.

III. They are likewise Judges, *in crimine falsi*; and their sentence is a sufficient warrant to the Assize to condemn, without repeating the probation; and when the Inquest refuses to condemn upon that warrant, they are of new inclosed: as was done in *Binnies* case; and will be liable to an Assize of error, if they assioilzie; and their Decreet bears the Lords remit him to the Justices, to be punished, *tanquam falsarius*, and to underly the Law criminally, and ordain'd that ordinance to be insert in their Books of *Sederunt*. And that order is in the Justice Court, call'd an Act of *Sederunt*, the 2. of *July 1662*. Albeit the Act of Parliament, *Fa. 6. Parl. 11.* requires that all probation in criminals; should be led in presence of the Assize; yet the answer is, that the Lords Decreet is only probation here, and that is read in face of the Assize.

The Lords likewise determine the punishment in falsehood, and remit in their Decreet, the party to the Justice, to be only banisht, or scourged, or have his Tongue board'd, according to the quality of the guilt. And I have seen a Gentleman, whom I will not name, in *Anno 1664.* only imprisoned by the Lords, for forging of a false Bond of suspension, because he was ingenuous, and in necessity. And albeit this may seem irregular, yet seeing the Lords are only privy to the Depositions, it is necessar they should have this
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allowance. I find it one of the rules set down by the Doctors, that *ubi cunque index principaliter cognoscendo reperit incidenter crimen esse commissum potest de crimine illo cognoscere*, C. *si adversus liber. l. pen.* And the example of this rule is instanced, in *Charta falsa. l. pen. C. de probat.* And upon improving an Instrument, or Writ, they have ordained, *omnes testes instrumentarios, & falsi fabricatores*, to be *falsarios*, and remitted them to the Justices, the 16. of *Februa. 1660.* *Fern, Innes and Tarbat* hang'd. But I remember not that they have in any other case cognosced upon crimes *incidenter*; albeit the foresaid rule would give them an incident Jurisdiction in all cases.

IV. I find that the Lords have made Statutes to regulate the Justices Courts, for upon the 1. of *June 1593.* they declared, that all landed men should be esteemed *pares curie*, and might sit upon Noble-mens Affizes, being pursued, *tanquamiterè jurantes sup. assisa*; and the Council uses to consult them in intricat cases, which are referred to them by the Justices. And thus in *Anno 1667.* they were consulted, whether the West Countrey Rebels, might be forefaulted in their absence.

V. But whether they be Judges competent to reduce, or review what is done by the Justices, or in the Justice Court, in any case, is not yet decided; but I have seen a reduction of Verdict, of an Inquest, pronounced against Mr. *William Somervell*, whereby he was found guilty of Usury. The reason of reduction was, that the Inquest had erred, *in calculo*, and it was contended, that the Lords were competent Judges to review errors, *in calculo*, for that was in effect but a civil Medium; and, where no criminal conclusion was craved, nor could follow, they were Judges, as in the case of Reductions of Retours, where the verdict may be reduce, as past upon ignorance.

It was also urged, that, seeing the Lords made Statutes to

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to regulate the Justice Courts, and pass their Bills, they might cognosce upon palpable errors, committed ignorantly by Assizes; and it were hard that the Ledges should not be repon'd against Errours of such ignorant persons, as Assizes ordinarily were.

VI. The Lords of Session do suspend the execution likewise, of all sentences in the Justice Courts; but these Suspensions, when once raised, are discuss'd before the Justices.

They likewise, sometimes discuss these Suspensions before the Session. And thus an Assize modified by the Justices, being exorbitant, the Lords, by way of Suspension, did lessen the sum. The reason of which Decision was, because they found this case to be but of the nature of damage and interest, and not to concern corporal punishment, the 16. of December 1664. *Innes contra Forbes*.

VII. By Act of Parliament 1555. such as kill, or wound, to the effusion of blood, or any other way, one another, during the dependence of a criminal Process (which dependance is declared to continue, from the execution of the Summons, till the compleat execution of the Decreet) that the pursuer committing the said crime, shall for ever lose the cause, and the defender being guilty, is to be condemned in the plea. The pursuer, or defender, being convicted before any competent Judge in criminals, without any probation, except summar cognition, to be taken by conviction, or putting the committer to the Horn, and denouncing him fugitive. By this Act the committer loses his life-rent Escheat immediately, after denunciation, without being Year and Day at the Horn; and giving of counsel, is art and part in the crime.

This Act was to continue only for three Years, and is prorogated for seven Years, by the 138. *Act Parl. 8. Ja. 6.* and is thereafter made perpetual, by the 219. *Act 14. Parl. Ja. 6.* &c.

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I have oft seen Proceſſes intented upon this Act before the Lords. But it is neceſſary, albeit not obſerv'd, that cognition be firſt taken by the Juſtices, or other criminal, and competent Judge. Yet without this, Proceſſes was ſuſtain'd by the Lords, *in prima inſtantiâ*; but this defence was not there alledg'd; and Proceſſes was ſuſtain'd, albeit no effuſion of blood followed, the 29. of July, 1662. *Harper* againſt *Hammiltoun*; where it was debated, whether the Lords might ſummarily receive probation of it themſelves, or remit the tryal to the Juſtices; for which doubt, I thought, there was no great ground: becauſe, by the Act foreſaid, the Juſtice is only Judge, *in prima inſtantiâ*. And yet, in *Sleiches* caſe, 1673. It was found, that no previous tryal before the Juſtices was neceſſary.

The Earle of *Niddſdale* purſuing the Tennents of *Duncom*, February 1672. they alledged *abſolvitur*, becauſe the Earl had beat ſome of them, who were ſent to execute a Summons at their inſtance againſt him, at leaſt he had given order to beat them, or ratihabited the beating of them: To which it was answered, that 1. The beating ſome of them, could only found an exception to ſuch as were beat; and this the Lords found relevant, though the Summons executed was for a common Cauſe: and ſo in effect, thoſe who were beat, repreſented all the purſuers. 2. It was alledged, that order to beat them was only probable, *ſcripſit vel juramento*: for, though a crime ordinarily, in a criminal Court, be probable, *pro ut de jure*, yet here, *quo ad civilem effectum*, it could not be ſo proved: for elſe a Noble-mans whole and ancient Heritage, might oft-times be taken away by Witneſſes, ſince Proceſſes depending, might extend to a Noble-mans whole Eſtate. 3. It was alledged, that ratihabition, or any deed, *ex poſt facto*, did not inter the contravention of this Act, which required explicit deeds, as beating, bleeding, &c. The Lords, before answer to theſe two laſt alledgi-

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ances, ordained Witnesses to be led, before answer, for clearing the nature of the Act, and violence committed against them; but in this case, as in all others, if the one party beat, the other being forced thereto by self-defence, the striker will not, *eo casu*, fall under the certification of the Act of Parliament, as was found the last of January 1673. *John Slicch against Swintoun*. In which case, the Lords also found, that the certification of this Act, did reach such as wounded one another, during the dependence of a pursuit, before an Interior Court; though it was alledged, that this respect was only due to the Lords of the Session, and that the Act should only reach, such as pursued Actions before them, for, to lose the whole Pley, was too great a punishment for an incident Riot, before an Interior Court.

I find likewise, that one *Weir* having been pursued for slaughter, the 15. of June 1591. he alledged, he was absolved by a Rolment of Court at *Aberdene*. To which it was replied, that the King had given a warrant for a further tryal, which reply, founded upon His *Majesties* Warrant, was repelled, as contrary to Law, and because it was but a private Rescript, not subscribed by the Chancellour, nor past in Council: And in respect, the Lords of Session had given a Warrant to proceed, notwithstanding of the Kings private Warrant. It is also observable (though I think it irregular) that *Ludwharn* having raised, in Anno 1596. a pursuit against *Mowat*, and others, for taking him out of his House, without a lawfull Warrant, gave in a Bill to the Lords, complaining that the Duke of *Lennox*, as Lieutenant of the North, intended to repledge; whereas that Jurisdiction was only cumulative with the power of the Justices: and that he had a Letter from His *Majesty*, ordaining the Justices to proceed; wherefore, he craved that the Justices might be commanded to proceed, which Petition was granted.

VIII. Albeit *regulariter*, the Parliament, or Council grant Warrands to Advocats, to appear for such as are Pannell'd before the Justices: yet I find that the Lords granted a Warrant in *Balmerinochs* case, to Advocats to compare for him. And seing Advocats are subject to the Jurisdiction of the Lords, it is most reasonable, that the application be made to them: for the same reason likewise, I find, that when any of the Lords are appointed Assessors, in Criminal cases by the Council, that they must have a Warrant also from the Lords, for sitting there, as in *Toshes* case, 1637.

TITLE IX.

The Admirals Jurisdiction in Criminals.

1. *The Jurisdiction of the Admiral, extends to all Crimes committed within Flood-mark.*
2. *Our Admiral has execute Pirats.*
3. *Whether it be lawful for such as apprehend Pirats, to execute them by their own Authority, in the Ocean, or when Judges refuse.*

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4. *Any Nation may Judge Pirats.*
5. *Whether the Justices have a cumulative Jurisdiction with the admiral.*

I. **T**HE Lord high Armiral and his Deputs, are by the Laws of all Nations Judges competent to the tryal of all crimes committed at Sea, and by an unprinzed Statute with us, the Admiral is competent in all controversies, actions and quarrels concerning crimes, faults, and trespasses upon Sea, or so far as the same flows, or ebbs, *vid.* Ship-laws corrected by *Balfour. tit. Admiral, &c. cap. 2.* Our Learned Countreyman, *King* in his Treatise which I have, sayes,

Admirans habet merum imperium, mixtum, & jurisdictionem simplicem; potest enim non solum jus dicere, quod est jurisdictionis simplicis, exequi, imperare, judices dare, coercere; quæ sunt meri imperii, sed est in facinerosos animadvertere, quod est meri imperii, de omnibus igitur contraversis marinis cognoscere potest Admirans. marinas intelligo, quæ negotiationis causa incuntur, siue extra mare, siue in mari celebrantur delicta tum ex necessitate intra maris fluxum perpetrari debent.

In *Scotland*, the Deans of Gild were, as *Walwood* observes *tit. 23.* ordinary Judges of old betwixt Mariner and Merchant, Likeas, the Water-Bailiff betwixt Mariner and Mariner, and the Justice-general was Judge in Criminals, but now no judge may meddle (says he) with the Admiral causes, but only by way of assistance, and that by Commission in difficult causes, as was found in that action, *Antoni de latour* against *Christian Martens*, 6. of November, 1642.

II. In *October 1635.* *Bernard Gilermo*, and some Spanish, Dutch, and French Pirats, being apprehended, *Mr. James Robertson* then Admiral-deput, craved that the Council would name Assessors to him in the tryal of these forreigners, and they being named, a Court of Justiciary of the Admiralty (for the Registers of the Admiralty give it that Title) was kept at *Edinburg*, and these Pirats indicted and hanged for Piracies committed

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ited by them upon *French, Spanish, and Dutch* Merchands, the parties injured are received witnesses, else these crims at Sea could not be proved; this tryal was by an Assize, as before the Justice, I II. By the Martim Law of *England*, it is lawful for any man who takes a Pirat in the Ocean, to hang him at the Mainard, because as it seems to me the Ocean is within no mans Jurisdiction, & so every man is left to his own natural liberty; but this may prove very dangerous, for thus men may execute their revenge in place of Justice, and may make innocent men Pirates, for their private advantage; and Judicatur is established to prevent such injuries; and upon that pretext men may well adju lge Prizes taken upon the Ocean: but yet if a Ship on her voyage to remot places, as the *Indies*, so that the takers cannot keep the Pirats till they come to a Harbour, they may in that case execute them at Sea, for that is a kind of self-defence; and necessity makes Law. But I think this necessity must be proved, *vid. Grot. de jur. belli. lib. 2. c. 20 §. 14.* And for this same reason, I differ from that Author, who asserts, *ibid. 12.* that if the taker bring a Pirat to a Port, and the Judge refuses, or delays Justice, so that the taker must lose, then the taker may execute Justice himself; for this were to make every man Judge, not only of the Pirat, but of the Judge to whom application was made, and a Privat person might as well pretend, that if a Judge delayed, or denied Justice against such, as we pretend did either rob or affront us, we might do Justice upon them our selves, contrary to many laws, and particularly to *l. nullus C. de judais.* The same learned Author, *Juris Maritimi*, doth tell us, *cap. 4. num. 1.* that if a *Spaniard* rob a *Frenchman* on the high Sea, both their Princes being in amity amongst themselves, and with *England*, and that the Ship is brought into the Ports of *England*, the *Frenchman* may proceed against the *Spaniard*, to punish him: but if the Ship be brought, *intra prasidia* of that Prince by whose subject the same was taken, it may be doubted if he can proceed Criminally; but the taker must resort to the

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the Pirats own Countrey, or where he carryed the Ship. But in my opinion, a Pirat may be Judged by the Judge of any Nation, for he is an enemy to all Nations, and though he be not deprehended committing a crime in the Sea of that Prince, or State, within which he is deprehended, and so seems not lyable to their Jurisdiction, *nec ratione loci delicti*, *nec originis*, *nec domicilii*, yet he who is of no Nation, is of all Nations, as Vagabonds are; and he who is an equal enemy to all Nations, commits a crime against every Nation.

IV. Though the Admirals Criminal Jurisdiction extends no further then crimes committed at Sea, or within Flood-mark, yet he is some times Judge, *ratione contingentiae & ob continentiam cause*, as if a man rescue a Pirat out of Prison, though this Crime be committed without Flood-mark, yet the Admiral is Judge, because it hath dependance upon, and arises from the principal Crime to which he is Judge: and if the Admiral begin to present Pirats, or Malefactors at Sea, he may continue his pursuit, and apprehend them at Land, and without his own Jurisdiction, but he must in that case seek concurrence from the Magistrat of the place, *Locen. cap. 3. num. 2.*

V. Though the Admiral has a Criminal Jurisdiction, yet some alledge that he has not this properly as Admiral, but by virtue of a Commission of Justiciary contained in his Gift: and therefore when the Admiral proceeds to try Crimes, the Court is not called the Court of Admiralty simply as in other cases, but the Court of Justiciary of the Admiralty.

It is likewise doubted, whether the Admiral hath the power of judging Crimes committed at Sea, or if the Justices have a cumulative Jurisdiction with them, and may prevent, and that the Justices have a cumulative Jurisdiction is clear for I find, that in *Anno 1613.* the Justices did hang *John Davidson*, and *John Lowes English Pirats*, and in *Anno 1610.* they hanged *Peter Love*, *John Cock* and others. Likewise, *English Pirats*, which last were hanged, upon the

own confessions emitted before the Privy Council, and all of them were hanged within Flood-mark. I have likewise seen the Justices Advocate Causes from the Admiral Court, but whether the Admirals sentence in Criminals can be reduced by the Criminal Court, as their sentences in Civils can be reduced before the Session, I will not determine.

TITLE X.

The Jurisdiction of the Commissars in Criminals.

The Jurisdiction of Church-men.

Our Commissars are Judges competent to verbal injuries.

How far they are Judges competent to improbations.

Church-men are discharged to sit Judges in Crimes, and the Canons of the Greek Church give them, *αυταμακτιν.* A bloodless Jurisdiction, upon which Count, the Law gives them, *audientiam, sed non jurisdicti-*
onem.

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onem, tit. C. de Episcop. audient. With us these Bishops abstain from voting in criminal Processes brought in to the Parliament, though there they sit as Heritors, rather than as meer Church-men, and so might pretend to a voice, upon that account.

II. The Commissars are the Bishops Officials, and so have least criminal Jurisdiction of all other Courts; but yet they are Judges competent to verbal injuries, which are by the Law accounted crimes: and the reason why they are the only Judges competent to this crime, is, because that Court, as being an Ecclesiastick Court, & *curia christianitatis*, considers these verbal Injuries as Scandals, and so they are allowed, not only to punish the same with Pecuniary Mulcts, but with Church Censures, such as to make the offender stand at the Church Doors to expiate a Slander: though it was allowed, that the inflicting of such punishments, was only proper to Kirk Sessions, the 15. of February 1669. But though they be the only Judges competent to verbal Injuries, where they are Scandals; yet in verbal Injuries done to persons of quality, which are called in Law, *scandala magnatum*, the Council sustains it self Judge competent; the King being as the Author, to the Protector of all the privilege of the Peerage; and in verbal Injuries likewise done to Magistrats, the Council are also Judges, Magistrats representing the King, and being his Instruments in the Government.

When verbal Injuries are done by Members of a Court to one another, that Court is likewise Judge competent, all Courts (how inferiour soever) having an innate Power to chastise its own Members, and to preserve the esteem due to it self; and therefore, if any stranger who has a Process, depending before any other Court, as the Session, Sheriff, &c. do abuse contumeliously any third Party, though no Member: yet these respective Courts may punish the same, if the injury

ry be done in face of Judgement, and if it be done to any Inferiour Judge extrajudicially, that Judge if he be in the actual exercise of his Office, he may likewise punish the same, except the offender be a Member of the Collidge of Justice, for in that case the Judge extrajudicially injured, must complain to the Lords, but cannot imprison them summarily, because, if this were allowed, these Members might be abstracted from serving the Liedges, as an Advocat when he is to plead a Cause, or a Clerk when he is to give out a Decreet: and this last has been frequently so decided.

Though verbal Injuries amounting to Scandals, are only to be punished by the Commissars, yet where they have nothing in them of Scandal, but are rather reflections upon the Honour of the party injured, as to call a Gentle-man a Puppy, or an Ass; it may be the Privy Council, and not the Commissars are Judges competent.

The Commissars are also Judges competent to Adultery, in so far as concerns Divorce, *vid. tit. adulterii*.

III. How far the Commissars, and Inferiour Judges, are Judges competent to the improving of Writs, and declaring them false, has been variously decided; but they may be reduced to these conclusions, 1. No Inferiour Judge is competent, to try the falshood of Writs, by the indirect manner of improbation, that is to say, by presumptions, for that way of tryal being in effect, *nobilis officii*, is only competent to the Lords of the Session. 2. Commissars, and other Inferiour Judges, are only competent to improbations, even where the direct manner is extant, if improbation be propon'd by way of exception, or reply; for then the tryal of Falshood falls in necessarily as a part of the Process, and without this were allowed to these Inferiour Judges, they could proceed in no case; for if a pursuit were intended before them, upon a Bond, they behoved to sist, if the Bond were alledged to be false; or to stop, if the defender should offer to improve the

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execution of the Summons : but yet they are not competent by way of Action, even where the direct manner is extant : as was decided the last of *November 1630. Williamson contra Cushman.* 3: If the Commissar, or other Interior Judge, pronounce once a Decreet, he cannot thereafter reduce his own Decreet, as having proceeded upon false executions, though the executions were given by his own Officer, since they are only Judges competent to such forgeries, *incidenter* : but after sentence, they are *functi* ; as was found the 29. of *January 1677. Cowan, contra the Commissar of Glasgow.* Phiscal, and according to these conclusions, the late instructions given to the Commissars, are to be interpreted.

TITLE

TITLE XI.

The Jurisdiction of Regalities
in Criminals.

1. *The Origine of Regalities.*
2. *They are accounted Inferiour Judicatures.*
3. *Why the Heritor of a Regality, is called a Lord of Regality.*
4. *Whether His Majesty may erect Regalities within the bounds of Heritable Jurisdictions.*
5. *They cannot repledge in case of Treason, nor from Justice Ains.*
6. *The difference betwixt Ecclesiastick and Laick Regalities, and from whom they may repledge.*
7. *The form of a Repledgiation.*
8. *Regalities must have a Burgh of Regality, and to what that Burgh is tyed.*
9. *The effects of a Lord of Regalities power.*

BY the Feudal Law (to which Regalities owe their origine) *alia erant regalia, alia erant feuda regalem dignitatem habentia*, which is the same difference in our Law, betwixt *Regalia*, and Regalities. *Regalia*, are such privileges as immediatly belong to the Crown, and do not originally

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ginally belong to, nor can be communicat by any else; such as to Coin Money, to open Mines of Silver, Gold, &c. But Regalities are Fews, which are granted by the King to a Subject, they have as large a Jurisdiction, as the Sheriffs have in Civils, or the Justices in criminals; the *habilis modus*, of granting which Rights, is by Signator, wherupon a Charter follows, which passes the great Seal.

II. Regalities are accounted inferiour Judicatur, *cap. 76. quon. attach.* by which it is Statute, that no inferiour Judge shall judge the Pleys of the Crown: and Regalities are expressly numbered amongst inferiour Courts, *Act, 173. Parl. 13. K. Ja. 6.* By which it is likewise Statute, that he who strikes any person, in presence of the Justices, shall incur the pain of death; but he who strikes any before the Sheriffs, Lords of Regality, or other inferiour Judge, shall only pay a hundred Pounds; but though they be accounted inferiour Judges, when compared with the Justices, or Commissioners of Justiciary, yet they have greater power in the way of their procedor, and in the proportioning of their fines, then Sheriffs, or other inferiour Judges have; for they may fine in a hundreth Pounds, though Sheriffs and others cannot, as was found the 30 of *January 1663. Stewart against Bogle.* And generally they have the same power, and the same allowance with the Justices, except when an exprefs Law makes a difference betwixt them.

The 43. *Act, 11. Parl. K. Ja. 2.* appoints that no Regalities should be granted, without deliverance of Parliaments, which nullity, of old, could not have been received, *ope exceptionis*, if it was clad with possession, *Hadd. 1610.* and they were still subject to Revocation by the King, if they were otherwise granted, as may be seen by the Revocation, 1633. and all preceeding.

III. He in whose favours the Regality is granted, is still called the Lord of Regality, though he be otherwise but a

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Barron; the reason of which, I take to be, because by the Feudal Law, *tria erant tantum feuda regalem dignitatem habentia, & quibus inerat jurisdictio regalis*, viz. *Ducatus, Marchionatus, & Comitatus*, and by the same reason it is, that no Lands can be comprehended under this jurisdiction by our Law, but such as belong to him, in whose favours that jurisdiction was granted, either in Property, or Superiority; and therefore it was found, that His *Majesties* Palaces, (though situated in Burghs of Regality,) were in Law no part of the Regality, but off the Royalty, and that such as lived in these Palaces, could not be cited at the Head Burgh of the Regality, but at the Head Burgh of the Shire, the 11. of *January 1662*. L. *Carnegie* against the Lord *Cranburn*.

IV. Whether His *Majesty* may erect Regalities within the bounds of Heritable Sheriff-ships, is controverted with us; and if he may, certainly he may thereby evacuate the Office of Sheriff-ships, though bought with real Money, which is hard. And yet the Exchequer past a Signator of *Drumlanrigs*, albeit *Niddisdale*, within the bounds of which Sheriff-ship it is erected, be an Heritable Sheriff-ship, and the like decision is related by *Hop. M. b. t.* and the reason seems to be, that His *Majesty* by granting an Heritable Sheriff-ship, alters not its nature; and the nature of a Sheriff-ship, is, that His *Majesty* is not thereby divested of Jurisdiction, and the Sheriff appointed, being but His *Majesties* Deput, his Creation cannot hinder His *Majesty* to erect a new Jurisdiction within its bounds, as he may erect a Burgh-royal therein, or a Justiciary, &c. When Lands are dispon'd in Conjunction, the Heritor retains still the Office of Regality, *Hop. loc. cit.*

V. Albeit it be regularly true, that Lords of Regality have the same jurisdiction with His *Majesties* Justices: yet this rule suffers two exceptions. 1. In the case of Treason,

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to which the justices are only judges competent, and that not only where the Treason libelled, amounts to the crime of *Perduellion*; but even in Statutory Treasons, such as firing of Coal-heughs, theft in landed men, &c. And some Lawyers are likewise of opinion, that these crimes which are declared to be the four Points of the Crown, viz. Robbery, Murder, Fire-raising, and Ravishing of Women, should not be liable to their jurisdiction; which opinion is founded upon the 2. *cap. leg. Malcolm. 2.* By which it is Statute, that all Robbers, Forcers of Women, Murderers of Men, and Burners of Houses, shall answer before the Kings Justice; and are therefore called Pleys of the Crown. And by the 14. *cap. Stat. Alex. 2.* it is ordained, that in all the Courts of Bishops, Abbots, and the Lords whatsoever, these four Pleys shall be reserved from their Court, to the Kings own Court, because they belong to the Crown: which is confirmed by the 76. *cap. quon. Attach.* Likeas *Skene de verb. signif.* Upon the Word *Placitum*, is clear, that these four Pleys of the Crown, belong only to the Crowns jurisdiction, or Justice-general, in the same manner with Treason he there likewise observes, that they are called *placita*, from the French Word *placitare*, which signifies *Litigare*, as *Mollineus* observes, *Sup. cur. Parl. parti. Primo cap. Sexto*: And yet *de facto*, Lords of Regality do ordinarily judge upon these crimes without any Commission. And I find that the 22. of *July*, *Brown* is assoilzied from a pursuit of Fire-raising, because he had been formerly pursued before the Marquess of *Hamilton*, and assoilzied. Actions of De-forcement also, in my opinion, being intended before the Justices, cannot be repledged, for the Kings Messenger being then De-forc'd, it is not fit that His Majesty should be obliged to seek justice from inferiour Judges, where His Officers of State cannot attend to pursue, and *cap. 27. l. 4. Reg. Maj.* it is said, that *ad solam curiam Regis pertinet placitum*

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namo vetito, and this the Justices sustain'd, the 23. of November 1675: in the case of *William Crichton*, though the debate was not allow'd to be booked.

The 2. exception is, that no Bailie of Regality can repledge from Justice Airs, *Act* 29. *Parl.* 11. *Ja.* 6. which was likewise Statute formerly, by the 26. *Act*, *Ja.* 2. *Parl.* 6: But in this case, the Bailie of Regality may sit with the Justice-general, yet seeing the forsaide *Act* of the 11. *Parl.* King. *Ja.* 6. allows only no Repledgiation to be from Justice Airs, holden by the Justice-general, it may be doubted, if when Justices Airs are holden by the Justice Deputs, or others, by virtue of particular Commissions, there may not be Repledgiation allowed in that case; but I think there cannot, seeing the *Act* *Parl.* *Ja.* 2. is general: and *Skeen* remarks this as a privilege of the Justice Air, *qua talis*.

VI. Regalities are divided with us, in Ecclesiastick, and Laick; Ecclesiastick Regalities were such, as were erected in favours of Bishops, Abbots, &c. And there are but very few Abbeys in *Scotland* which were not erected in Regalities; and when these were annexed to the Crown, by the forsaide 29. *Act*, *Parl.* 11. K. *Ja.* 6. It is declared, that the Bailie, or Stewart of the Regality shall have the same power he had before to Repledge, from the Sheriff, or Justice-general, in case he have prevented the Justice-general, by apprehending, or citing the Person, before he be apprehended, or cited by the Justice; but, if the Justice have prevented, as said is, when the Bailie, or Stewart of the Regality, shall not have power to Repledge, but he may sit with the Justice-general, he pleases: so that in effect, by this *Act*, there is difference betwixt Ecclesiastick and Laick Regalities; that in Laick Regalities, there is a Right of Repledging still, as said is; whereas Ecclesiastick Regalities have not this priviledge, except they prevent the Justices; but otherwise, the Bailie of Regality may only sit with them: Which difference seems

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to be acknowledged in the debate, at His *Majesties* Advocates instance, against several Fore-stallers, upon the 26. of *June* 1596. And thus Mr. *John Prestoun*, then Depute to the Regality of *Musſelburgh*, was not allowed to Repledge, but to sit with the Justices, in the tryal of some Witches, upon the 29. of *July* 1661. The reason of this difference was, that the Regalities having been only granted, in favours of the Religious Houses which were suppress'd. The Regalities became extinguish'd with them, and His *Majesty* having, *ex gratia*, only renewed their Offices to the Lords of Erection, he thought that they were abundantly gratified, by this new concession, without allowing them the power to exclude their own Justices, in case of prevention; and this was also a favour to the Lienes, in not troubling them with two Courts. Nor were the Lords of Regality much prejudg'd; for by the same Act, they retain the whole right to the Escheats, and Fines, even of these who are condemn'd by the Justices. And therefore the Lords found, that the Lord of Regality had right to the Escheats of such as were condemn'd by the Justices, or Justices of Peace, the 22. of *July* 1664. *Elizabeth Sutherland contra Conradge*: so that this holds not only where the Justices sit with the Lord of Regality: but likewise where the Justices condemn without the others concurrence; and yet it may be urg'd, that since the Lord of Regality serves not in that case, he ought not to get these Casualties, which are the reward due to these who do justice, and the Lord of Regality has himself only to blame, who did not either prevent, or repledge.

Bailies of Regalities may likewise repledge from the King's Lieutinent, as was found the 19. of *August* 1596. And it is clear by the foresaid Act of Annexation: and likewise from any Commissioners appointed by the Council, as was found the 15. of *May* 1568. And from the Justices of Peace, in Riots, and Bloods: as was found by the Lords of Session, *July* 1617. that

these causes being of small moment, and requiring summar and unexpensive cognitions, seem to require easier, and less solemn tryals in the procedor, then repledgiations will allow. And yet by *c. 11. de appell.* I find that *licebat in remimina appellare*; nor can the parties injured complain, since they might have made their application to the Lord of Regality: Nor should their error prejudice his jurisdiction.

VII. The manner of repledgiation from any Court, is, that either the party himself, who hath the power of repledging, or some other having a Procurator from him, compares and produces his Charter of Election; for the production of the Sealing is not sufficient, seeing that is but *assertio Notarii*: yet sometimes without production of the Charter, repledgiation will be sustain'd: because it is notour that the repledger hath a Regality; as in the Duke of *Lennox* case, 1637. As also, repledgiation will be sustain'd, upon production of the criminal Register, bearing, that it was formerly sustain'd to the same persons, *May 1668.* *Ardncaple* against the Commissioners of the High-lands: Yet it may be doubted, whether the production of a Lord of Regalities retour, will be sufficient to instruct that he hath a Regality: and it appears it should, since a retour is a sentence, and so is a sufficient instruction, till it be reduced.

He who offers to repledge, must find Caution of *Culrach* to do justice, within year and day, upon the person whom he repledges; and if the Judge to whom he is repledged, doth not justice within year and day, he *tines his Court* (as we call it) for year and day; and the *Culrach* (for so the Cautioner is called) who hath, upon his becoming Cautioner, borrowed the Defender, is in an unlaw, and the Judge from whom he was borrowed, or repledged, may proceed to do justice, as formerly: *Skeen, de verb. sig.* The Pannel likewise, who is repledged, must find Caution for his own ap-

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pearance before the Lord of Regality; to underly the Law, for the crimes laid to his charge, the 16. of May 1599. Patrick McKalla, against the Regality of Lennox.

No person can be repledged, except he be present at the Court, from which he is desired to be repledged: for a party who is absent, cannot find Caution to sist himself before the Court, to which he is repledged; as was found in the case of *Armstrong*, who being pursued for murdering some Customers, was desired to be repledged by the Earl of *Anandale*, Anno 1666. Nor can a person be repledged after defences are proponed for him: for this being, *reconsuetudo iudicis*, it must be, *ante omnia*, propon'd, *dum res est integra*.

VIII. When Regalities are erected, there is a Burgh of Regality expressed therein; and though that Burgh may choose Bailies, yet the Bailie of Regality hath still a cumulative jurisdiction with those Bailies of the Burgh of Regality, in that same way that other Superiours retain still a cumulative jurisdiction with their Regality; as was found the 24. of *January* 1668. betwixt the Bailie of *Killimure*, and the Burgh thereof. This Burgh is oblig'd to maintain a sufficient Prison, not only for Criminals, but for Debtors, by the 273. *Act*, 15. *Parl. Ja.* 6. And all Captions bear the Letters, to be direct to Bailies of Regalities, &c. And yet by that *Act*, these Burghs seem only to be oblig'd to intertain Prisoners, where there are Provost, Bailies, and Common-good, *Nota*, that these words of that *Act*, by the Sheriff to Stewarts, and Bailies of Regalities, are all printed; for the word *to* should be *or*. The Lords likewise decided thus against the Bailies of Regalities, the 7. of *July* 1668. *Hamilton contra Callender*. In this Burgh all Courts must be holden, Yet defenders are oblig'd to compare at any other place within the Regality, to which they were expressly cited: As *Had.* observes in a case, the 16. of *March* 1622.

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Or, if the Lord of Regality was in use to hold his Court else where, for a considerable time, without interruption, the Vassals, or any other Defender, is oblig'd to appear thereat, though it be not the place design'd, in the Charter of Erection, as *Had.* observes, *December 1624.* And if the party, who is desired to be Repledged, dwelt within the Regality, the time of the committing of the Crime, the Repledgiation will be sustain'd, though at the time of his being accused, he be removed without the Regality: as was found, the 21. of *November 1632.* in the case of one *Weems*, who was desired to be Repledged, to the Regality of *Methuen.*

Lords of Regality are oblig'd to hold Justice-Courts twice a Year, 3. *Parl. K. Ja. 2. Act 5.* and if they be negligent in causing rest and stolen Goods be restored, the Sheriff may fulfil their place, *Act 11. Parl. 15. Ja. 2.* And when Erections fall into the Kings hand, the Inhabitants thereof may be justified, *id est*, judged by the Justices, *Act 26. Par. 6. K. J. 6* but this Act can only take place, till a Stewart, or Bailie be appointed. For *Regulariter*, the Kings own Stewatts of Regalities may repledge from the Justices.

A Lord of Regality cannot sit himself in his own Court, but must administer by a Bailie, who is sometimes admitted by a simple Commission, during his life; or otherwise he is admitted to be Heritable Bailie: which Right passes by Infeftment; but this Bailie is in Lands belonging to the King, and is properly call'd the Stewart of the Regality: though sometimes the Kings Deputs in Regalities, are likewise call'd Bailies, as in the 5. *Act 3. Parl. K. J. 2.*

IX. Lords of Regality cannot cite Witnesses, without their own jurisdiction, but they must have Letters of Supplement for that Office; though generally they may proceed in the same way that the Justice-General doth; but they

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may exact Caution to enter as Law-will, from the defenders; after sentence is given, as was found the 7. of October 1668, betwixt Mr. *John Prestoun*, and Mr. *John Pape*, which seems to be a greater priviledge then the Justices have, who cannot presently exact Caution of any person, for paying an unlaw, but can only raise Letters of Horning upon the Act of Adjournal.

The Lords of Regalities have right to the single Elcheat of rebels, living within their jurisdiction; as also to the Elcheats of all persons, condemned for crimes, committed by the Inhabitants within their jurisdiction, albeit condemned by the Justices: from which general rule, *Hope* in his lesser Practiques, excepts only the case of Treason; but it may be doubted, whether exception may not be likewise made of all other Pleys of the Crown, seeing the Lord of Regality is no more Judge competent to these, then he is to Treason.

I was once consulted, whether a Lord of Regality might place a Gallows upon any part of his Vassals Land, lying within his Regality? and at first it seem'd that he might: for, *unaquaque gleba servit*: and what was lawtul in some part, was, where there is no restriction lawtul in any part: but if there was a former place fix'd upon by custome, I think the Lord of Regality could not alter the same. 2. If there were any apparent design of affronting the Vassal, I believe he could not use this priviledge; as if he did offer to place the Gallows, at his Vassals Gate, or at his Garden-door, or any such places: for, where the Law sayes, that *quilibet potest uti jure suo*, it adds, *modo hoc non faciat principaliter in amulationem alterius*. 3. Even in other places, there is some *moderamen & decorum*, to be observed: and I doubt not, but upon application to the Council; they would appoint some persons to choose an indifferent place: for even in these servitudes, *ubi unaquaque gleba servit, hoc accipiendum est civiliter*

The Jurisdiction of Sheriffs in Criminals. 411.

Williter (saves the Law) & non judaice: for if a man should grant me a servitude of a way to my house through any part of his ground, yet I could not compel him to throw down his Garden walls, or to suffer me to go thorow his Corns, if there were, or might be another passage found, though it were not so near.

TITLE XII.

The Jurisdiction of Sheriffs in Criminals.

1. *The origine of this office, and how it is conveyed in Scotland.*

2. *He is the chief preserver of the peace, and so may convocate the Liedges, apprehend sayers of Masse, false Coyners, &c.*

3. *He is not Judge to the four Pleys of the Crown.*

4. *The way of procedure before the Sheriffs.*

5. *Whether he may judge where no privat party complains?*

6. *He*

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6. *He should attend the Justice Aires.*
7. *How he is to be punished if he transgress in his office?*

A *Lluredus*, in the League made with *Guthern* King of Denmark, divided England, in *Satrapias*, *centurias*, & *desmarias*, and called *Satrapiam* a Shire, that is to say, a Section or division of Land, from the word Shire, which signifies to cut so that a Sherifdom is a Jurisdiction within the bounds of a particular limited Countrey: It is called in our Latine stile, *vicomitatibus*; and though most of the Shires in Scotland be erected in Sherifdomes by particular Acts of Parliament, yet by an unprinted Act in Anno 1504. It is declared that His Majesty may erect, unite, or divide Sherifdoms without consent of Parliament: And though his Majesty erect a Burgh-royal or Barrony within the Sherifdome, yet they still continue to be under the Jurisdiction of the Sheriff, and they have a cumulative Jurisdiction with him; but not privative of him. Sheriffs in Scotland, are either during life, and then the office passes by a signatour, and passes the great Seal, or otherwise it is conferred as an heretable right, *quo casu*, though it be transmitted in the same way and manner with other heretable rights yet because it is *merum jus incorporeum*, it requires no seisin but albeit all these heretable offices were upon good reasons discharged by the 44 Act 11. Parl. K. F. 6. seing *industria personarum respicitur in iudicio*; And albeit, K. F. 6. and King Charles the first, did design to buy in all the heretable Sherifships, as bought in many, yet there are many of them to this day enjoyed by Noble-men and others.

II. The Sheriffs of Scotland, have a Civil and Criminal Jurisdiction, but the last of these, is that which we are only consider as peculiar to this Treatise.

The Sheriff is in effect the Supreme Justice of peace, whom is mainly entrusted by the Law, the securing of the

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and tranquility of that part of the Kingdom which is sub-
ject to his Jurisdiction; and therefore though no other person
be allowed to ride with gatherings of the Liedges, yet the She-
riffs is, nor can he be pursued for a convocation upon that
account; seeing he may convocat at his pleasure for repressing
tumults, and upon many other accounts, as was found in
February 1664 betwixt the Earl of Seaforth, and the Laird of
Hillingown, for it doth belong to his office, to discharge all
convocations of the Liedges, and if they refuse, he should con-
tinue his Court, and advertise the King. K. Ja. 3. Parl. 14.
Act. 104.

Albeit, in civilibus; neither the Sheriff, nor Barrons, can
hold Courts in seriat, or close, time of vacance. Yet in Crimi-
nals he may hold Courts during the time of vacance quia pericu-
lous est in mora, as is observed by Haddingtown, the 19. January,
1623. And Sheriffs has not power to exact caution from a
defactor to underly the Law, for he cannot proceed except
either the defender be cited, or, *deprehenſus inſlagranti crimi-*
natus. Mart. 1628.

The Sheriff is Judge competent to the crime of Witch-craft;
seen Mary her 9. Parl. Act. 37. albeit *de praxi*, none used to
judge Witch-craft, but the Justices, or such as have a parti-
cular commission from the Council. They should apprehend
the slayers and hearers of Masse, Act 5. Pa. 1. K. J. 6. And
the strikers of false Coyn, J. 3. Pa. 3. cap. 18. but they are
not allowed by the Law expressly to proceed in either of these
things; from which it may be argued that they are not Judges
competent thereto, for else the Law had expressly allowed
them the same, & *inclusio unius est exclusio alterius*:) They
could apprehend, punish and banish Sorners, J. 2. P. 6. cap.
Egyptians, J. 6. P. 12. cap. 124. Idle-men, Ja. 1. P. 3.
166. Shooters with fire-works. Q. Mary. Par. 4. cap. 9.
Re-stallers, J. 5. P. 4. cap. 20. Transporters of Neat and
sheep, and other Cattel, Ja. 6. Par. 7. cap. 124. Ja. 6.
Par.

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Par. 12. cap. 129. The destroyers of Planting, *K. F. 6. P. cap. 84.*

III. Sheriffs may at any time condemn for Blood-weir but the penalty cannot exceed fifty Pounds,

The Sheriff nor no other inferiour Judge, can Judge four Pleys of the Crown, *viz.* open Robbery, Fire-raising and ravishing of Women, and Murder. Yet of old, Sheriffs might sit upon Slaughter, if the committers were attacht within forty dayes thereafter, *cap. 59. quon. attach.* And *Act 8 Par. 6. F. 1.* And if he be taken red hand, he should be execute by the Sheriff within that Sun, *ibid.* And yet by the *Act, Parl. 3. K. F. 4.* Three Suns are allowed conform to the old Laws; and if the committer of the Slaughter fleeth the Sheriff shall acquaint the next Sheriff, and so from one Judge to another, until the committer be apprehended, and when he is taken, he is to be sent back to that Sheriff where the crime was committed, where justice is to be done upon him, and if he be found guilty of Fore-thought Felony, shall dye; therefore *Act 89. Par. 6. Fa. 1. Ratified Act 28. 3. P. K. Fa. 4.* with this addition, that if any heretable Sheriff neglect his duty in prosecuting of this crime, after this manner, he shall lose his heretable office for three years, but if he have not that office for the time, he shall lose it during all that time. From which Acts, it may be concluded, that the Sheriffs is not only Judge competent to Slaughter, but to murder, and both to the one and to the other at any time, if he has either apprehended the person, or has *ex in continenti*, done diligence for apprehending him, but the Sheriff is not Judge competent to murder, though committed within his jurisdiction, except in either of these cases.

IV. The way of procedure before the Sheriff, is by an Assize and the Procurator-Fiskal is pursuer in place of His Majesty's Advocate; Yet sometimes the Sheriff, or Barron may condemn upon the Pannels confession, without an Assize, as *Dur.*

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serves, penult *January* 1622. but if the party be present, the Sheriff cannot condemn him, as holden, *pro confesso*, though he refuse to depon; but *eo casu* he must put him to the knowledge of an Assize, as was found 24. *July* 1633. *Dickson contra Halyday*. And albeit a blood proven by confession, may be punished by an unlaw of fifty pounds; yet when blood is punished upon contumacious refusal to swear, the unlaw cannot exceed ten pounds, 17. *February* 1624.

V. The Sheriff may pursue, when any person compears and insists with him in the pursuite, but if the crime be pursued by way of inditement without the concurrence of any party, the Justice general is only Judge competent thereto: *Skeen verbo Sheriff*, but that rule is too general, and may admit of this distinction, *viz.* that either the Thiet is taken with fang, and then the Sheriff may proceed to judge him, though no privat pursuer insist against him. Nor needs there three fangs for justifying that pursuit, Albeit Sheriffs now never proceed, but where three fangs are proved. Or else no fang is found, & *eo casu*, the Sheriff cannot judge the thiet, except there be a pursuite intended at the instance of a privat party.

VI. The Sheriff should assist in all Justice Aires holden by the Justice General, or the Chamberlain, and should produce the verifications of all the Summonds which is made to the Justice Air, and should make provisions at the Justice Air, and his Clerks, which should be allowed in the first end of his accompts to the Exchequer, and he should arrest such persons as the Crouner cannot arrest, and should thole an Assize upon the last day of the Justice Air, anent the execution of his office. *Ja. 3. Parl. 14. cap. 102.* and if he be found culpable, the Justice General may remove him from his office till the next Parliament, and put another in his place, to officiat in the interim. *St. Rob. Bruce, ex lib. Sconen.* related by *Skeen, ibid.* but much of this is antiquated by custome, for the Thesaurer sends along with the Justice Air, a person specially commissio-

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nated by them, who defrayes the charges of the Justices and Justice Clerk.

VII. If the Sheriff fail in his duty, he was punished of old by the losse of his office during his life, and imprisonment during His Majesties pleasure, *St. David Cap. 13. & 69.* but now for negligence in his office, he tines the same for year and day; and is punishable in his person, and goods, at his Majesties pleasure, *Fa. 2. Par. 14. cap. 37.* And yet the Lord Yester, having suffered two Thieves negligently to escape, and his heretable office of Sheriffship being upon that accompt taken from him by King James the fifth, that Decreet was reduced, for it was found too small to infer the los of an heretable office, *Stat. Sessionis, pag. 34.* which is observed by *Hop.* likewise in his larger Practiques.

If the Sheriff absolutly refuse to do Justice, he loses likewise his office, and is punishable at his Majesties pleasure, but if he do injustice, he loses his office, if it be heretable, for three years; but if it be not heretable, he loses it during the time he was to enjoy it formerly, and in both cases he is punishable arbitrary in his person, and is obliged to reitound the damage and interest sustained by the parties læs'd, *K. F. 3. P. 5. cap. 26.* but if he bribe, or give partial counsel, he forfeits his fame, honour and dignity, and is likewise punishable in his person and goods, *K. F. 5. Par. 7. cap. 104.* If the case be difficult, the Lords of Session will sometimes Advocate the cause from the Sheriff to the Justices, as in the case of Theftboot, pursued by *Connaage*, the Sheriff deput of *Inverness* against *Makintosh*, And sometimes the Council will discharge the Sheriff to proceed without Advocating the Cause, if they find either the case to be difficult, or the Sheriff and his Deputs to be suspected,

TITLE

TITLE XIII.

The Criminal Jurisdiction
of Barrons.

1. *In what cases Barrons may judge.*
2. *The Clerk of that Court needs not be a Nottar.*
3. *Whether he may punish Theft, or Fire-raising.*

1. **A** Barron, in our Law, is generally understood to be one who is Intest in any Lands, though not erected in a Barrony: in which sense he has no Jurisdiction, but only that he can unlaw his own Tennent for Blood committed upon his own ground, as was found the penult of *January 1622. Fohnstoun* against the Laird of *West-nisbit*: but a Barron properly, is he who is Intest with power of Pit and Gallows, *fassa & furca*.

A Barron Judges crimes in the same manner, as they are judged by the Sheriff, and may like him proceed in time of vancance, to judge these crimes, to which he is otherwise competent. But it has been controverted whether Barrons have been Judges competent to Proccesses, for penal Statutes, since the penalty there was to be applyed to the Kings Fisk, and so should be judged in his own Court: but the Lords found the 3. of *February 1674.* that they were Judges competent

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to penal Statutes, by the constant custome of this Nation.

Albeit in civil cases, Barrons may appoint Baillies; yet *Balfour cap. 63.* observes, that *in criminalibus*, no person below the degree of a Barron, may sit upon Blood, *nam potestas gladii est meriti imperii qua nullo modo delegari potest*, except there be an express power given by the Sovereign for that effect, as in the case of Justices, and Sheriffs, who have power to Deput; and that power of Deputation were unnecessary, if it were otherwise competent.

II. The Clerks of all other Courts must be Notars, but the Clerk of a Barron Court needs not be a Nottar; and yet the Decreet of a Barron for an unlaw will be sustain'd, founded upon a confession, though the confession be not subscribed, as is observed by *Durie*, the penult of *January 1622*. But by an Act of *Sederunt*, it is ordain'd, that no sentence of any Inferiour Court, for above an hundred Pounds, shall be sustain'd, except it be otherwise warranted, then by the consent of the Clerk.

Albeit by the 75. *Act Parl. 6. K. Ja. 5.* the Barrons Precepts (for Summonds in that Court is so called) should be execute, as Summonds before the Lords, and Coppies should be left, and they indorsed upon; yet the 11. of *July 1634. Hay*, against *Airth*, it was found, that executions by a Barrons Officer are valid, though not given in Writ, and that the same are probable by Witnesse.

III. A Barron having power, may judge of Theft, if the Thief be taken in the tang, *quon. attach. cap. 100.* where it is Statuted, that *baro qui libertatem habet de sock, & sack, toll, & theam possunt judicare furem salsitum de aliquo furto manifesto: sicut hand habband, & back beirand. de praxi*: Barrons do not punish Slaughter; yet it may be urg'd, that they have power to do so: because, 1. The power of Pit and Gallows would import; the power of judging life and death. 2. By

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the 77. cap. *quon attach. omnes Barrones qui habent furcam & Fessam de latrocinio, de hominis occisione habeant furcam, id est curiam*, as the marginal note bears: and by the 13. cap. *Leg. Mal.* 2. It is Statute, that Malefactors, who hold of Barrons, may be condemned after the same manner, that other Malefactors are, except in the four Pleys of the Crown, in which, Barrons have no power; from which it may be very clearly inferred, that *quo ad*, other crimes they have, *nam exceptio firmat regulam in non exceptis*. 3. By the 91. Act, *Parl.* 1. *f.* 2. It is Statute, if a man be slain in the Barrony, if the Barron be Intert with such freedom, he may proceed as the Sheriff doth. And albeit *Hope* in his larger Practiques, observes, that these words of the Act (*if he be Intert with such freedom*) may receive various interpretations; yet I see no interpretation they can properly receive, except this, that these words are meant, if he have the Jurisdiction proper and competent to a Barron, which is Pit and Gallows, *nam verba generalia interpretanda sunt secundum subjectam materiam*.

Albeit wilful Fire-raising be one of the Pleys of the Crown, yet a Barron may cognosce upon, and punish the raisers of Breachably, within Husband Towns in the Barrony, *f.* 1. *Parl.* 4. cap. 75. The words of which Statutes, are, if Fire happen within Husband Towns of Barronies; we leave them to be punished by their Lords, in like manner, as Bailiffs in Towns do within Burgh; in which Act, by the word, Lords, are meant Barrons, for they are in several Acts of Parliament, called Lords of their own Land, or Barrony.

A Barron may unlaw for absence, for ten Pounds, but not above, and for blood, he may unlaw for fifty Pounds, but not above.

TITLE

VITLE XIV.

Of Justices of Peace.

Our Justices of peace, were called *Irenarchæ*, which signifies in the Greek, the keeper of the peace, *irenarchæ* *trans* *qui ad provinciarum tutelam quietis ac pacis per singula territoria faciunt stare concordiam, dicebantur etiam latrunculatores, seu latronum expulsores.* Their Office was to apprehend Rebels and Thieves, whom they could only examine, and send to the President of the Province, but could not judge them themselves; their office is more fully described, *lib. 10. C. tit. 75.* but to speak properly, *latrunculatores*, were our Constables called by the *Greek Lawyers*, *ἡγοδῶνται*

Justices of peace, and Constables were once fully settled amongst us by K. 7. 6. but their office having fallen in desuetude, it was revived by 38. *Act, 1. Parl. 1. Sess. K. Ch. the 2.*

By this Act they are allowed to meet four times in the year and to adjudge of Servants fees, and of mending the highways, they have power to punish the cutters and destroyers of planting, green wood, slayers of red and black Fishes, makers of moor-burn, keepers of Crooves, wilful Beggars, Egyptian and their receptors, Drunkards, prophaners of the Sabbath as to all which His Majesty promises to give them ample commissions: and to the end, their power may not prejudice any other Court formerly erected, it is appointed by that Act that fifteen dayes shall expire after the committing of the fact

for which the committer is to be conveyned. Which interval given to the Judge competent to do diligence, and if he omit the same during that time, then the Justices may judge the time, and one Justice has power to bind the party complained upon, to the peace, under such pecunial Sums as he shall think fit, and that either at the instance of a complainer, who shall give his oath that he dreads harm or the Justice himself may exact the sum, though none complain. And if any person being charged to make his appearance before the Justice of peace shall refuse, if he be a landed man, whose rent exceeds thousand Merks, or ten Chalders of Victual, then he shall inform any of his Majesties Privy Council, or if he be a meaner person, he may cause bring him by force before himself.

If the Sheriff, or Bailiff condemn any person in blood-weir, or any other pain, but not proportionally to the offence; then the Justices shall inform the Privy Council, that they may take order therewith; but if there be no satisfaction made by the Sheriff or Bailiff to the party, the Justices may modify a reasonable satisfaction.

If the Sheriff or Bailiff do by collusion, clear the Delinquent of an Assize, the party once cleared is not to be further questioned, but the Judges are to be punished by the Privy Council.

The Justices of peace are declared Judges competent to all riots, and breaking of peace, if the committers be under the degree of Noblemen, Prelats Councillors, and Senators of the College of Justice, who may refer the Summonds to the party, if he be personally Summoned, and thereupon hold himself as confessed, but if the Summonds be not personally executed, then the defender is to be summoned of new at his dwelling house, and these two citations at his dwelling house shall be equivalent to one that is personal: if the committers be of the forefaid quality, then the Justices, though they cannot

cannot judge them, may for preventing of Ryots, command them to find caution for keeping of the peace, and to compare before the Privy Council, and though they compare not yet whatever breach they commit in the interim, shall be reputed as great a contravention, as if they had found caution: At the end of every quarter Session, the Justices of peace, are to send to the Clerk of the Council, a Catalogue of all such persons, as they either have committed, or have under surety, with a short abreviation of the cause thereof (which is that which the Civil Law in the former Title called *transmittere cum elogio*) to the end that the Council may determine betwixt and the quarter Session what shall be done with them.

TITL

TITLE XV.

The Jurisdiction of the Justices,
and of the several imployments
of the Officers of that
Court.

1. *Who were Judges to crimes in Greece, and at Rome.*
2. *The Jurisdiction of the Justice Court with us.*
3. *The power of the Justice general, and Justice-deputts.*
4. *The Office of Justice-clerk.*
5. *What Actions are peculiar to the Justice-court.*
6. *The Mayors, and Coroners of the Justice-court.*

1. **A**LL Nations have committed the cognition of crimes, to the wisest of their Judges, because our lives are our greatest concern, and if the Judge erre there, his error can seldom be repaired. The Athenians had the *Areopage* for their Criminal Court, which was the most famous Court, then in the World, of whom the Grecians u'd to say, *τοις αρεοποις ο παγιοτον αρσπαγειτων βουλην*. And they judged Homicide, in a particular place, *εν παλαδω*, it was very numerous, and the *αρετοι*, institute by *Solon*, for judging crimes, were likewise so. At Rome, *Præfetti Urbis*, judged all the crimes that

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that were committed within the Town, & *intra centesimum lapidem*, and the Proconsuls, and Presidents, judged crimes in the Countrey. But the *praefectus pratorio*, *praefectus augustalis*, *Comes Orientis*, & *vicarius praefecti pratorio*, had also a criminal Jurisdiction.

The Justice Court with us, had for its Members, the Justice-General, the Justice-Clerk, the Justice-Deputs, the Clerk-Depute, the Dempster, the Officer, and the Masters.

II. The Justice-General is constitute by a Gift under the great Seal, either *ad vitam*, or by a temporary Commission, but still under the great Seal; his Salary of old, was five Pounds for every day of the Justice Air, *leg. Malcol. cap. 2. num. 3. 1.* but now it is arbitrary, and the ordinary Salary, by his Gift, is two hundredth Pound Sterling, to be uplied by himself, out of the Fines of Courts, and if he cannot attain to payment that way, out of the Exchequer.

The Justice-Court of old, was the only Sovereign Court of the Nation, and had then a great part of that Jurisdiction, which the Session hath now. For they were Judges to Recognitions, Brieves of Mortancestrie, Dissasine, *Propresture*, and d strictions for debts, *Reg. Maj. lib. 1 cap. 5. num. 2. & lib. 2. cap. 74. quom. all. cap. 52. & 53. lib. 3. cap. 28.* And after the constitution of the Session, they remain'd still Judges to Perambulations, and Brieves were directed in Latine, for trial thereof, and the reason hereof seems to be, because as the Civil Law observes, *ad arma curratur in finibus regundis*, and the fittest person for compescing such tumults, was the Justice-general; but now the Sheriffs, and Lords of Session cognosce such cases: and I having caused raise an Advocation from the Sheriff of *Tivridale*, at the instance of some *Fedburgh* men, to the Justice-general, *ex hoc capite*, the Lords would not sustain the Advocation, but re-

mitted

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mitted the case back to the Sheriff, whom they found also competent, so that such Brieves may yet be directed to the Justice-general, though he have not a privative jurisdiction therein.

III. I find the Justice-general, call'd the chief Justice in all the Registers, *Annis.* 1637. and 1638. and the principal Justiciar, *Anno* 1503. The Justice Deputs were not limited to any definit number, but usually they were two, and have each a pension from His Majesty, when they were constitute, by a Gift from him, which passes the Privy Seal only, and these were still call'd His Majesties Justice-Deputs, and are not Deputs to the Justice-general; for else they could not sit in judgement with him as they do, and in effect they have an equal power, and voice with him: but when he makes a Deput, he should not sit with him, *nam delegatus non simul concurrit.* And I find Mr. *Alexander Colwil*, call'd in his Gift, General-justice-deput, which is done to denotat the universality of the Jurisdiction; and to distinguish them from Justices in that part, such as are these Noble-men and others, who have the power of Justiciary over their own Lands. And in *Binnies* case, the Lords having remitted him to be tryed by the Justice-general and his Deputs, the Justice-deputs declar'd, that they accepted only of the remit, as meaning they were His Majesties Justice-deputs: and when His Majesty directs any Letter to them, he directs it to our trusty and well beloved Cozen and Councillour, to our trusty and well beloved, our Justice-general, and Justice-deputs.

Of old, I find there were eight Justice-deputs. The Justice-deputs had formerly the priviledge of being Present at the Council, which was very fit, because many criminal cases comes in before them, and they retain still the priviledge of being Present at Parliaments: they were call'd *attornati justiciarii*, *quon. attach. c. 61. & assis. R. David. c. nul.*

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lus. By the 1. Article of the Regulation, 3. Session 2. Parl. Ch. 2. the Office of Justice-deputs is suppress'd, and five of the Lords of Session are adjoined to the Justice-general, and Justice-clerk, four of the number being a *Quorum*, except at Justice Courts, because then the Justices are divided, and two may be a *Quorum*; their present Habit is Scarlet, adorned with white, and this I find the Kings of old, had *vestem purpuream sed albi habens non nihil admixtam*. Perion, de magistr. Rom. pag. 574.

I V. The Justice-Clerk has his place from His Majesty by a Gift, under the great Seal, with power to appoint Deputs, for whom he shall be answerable, and is call'd in his Gift, *clericus nostræ justiciariæ*; but whether the Justice-clerk be a Judge, or a Clerk only, has been doubted; and that he is a Judge, appears not only from our inviolable present custom, wherein he sits and presides, when the Justice-general is not present, and takes precedency from the other Justice-deputs, but likewise by the 87. Art. 11. Parl. J. 6. expences are ordained to be modified, to the party cleansed, by the Justice, Justice-clerk, and their Deputs, *sed ita est*, that modification of expences, is a judicial sentence; at least, is *actus jurisdictionis & jurisdictio tantum explicari potest per judicem & non per actuarium vel referendarium*. As to the reason of the name of justice clerk, it is received by Tradition, that because *clerici*, or Church-men of old could not sit in Criminal Courts, seeing the Law gives them, *δίκην ἀναιμάκτων*, a bloodless jurisdiction, therefore they were allow'd to nominate a Clerk, who might represent them; who was therefore called, *non clericus justiciarii*, the Clerk of the Justice Court, but *justiciarius clericus*, yet this seems a groundless conjecture, for in no Municipal Law, could Church-men sit upon blood, and therefore could not Deput, & *qui facit per alium, facit per se*, and what necessity was there, for their having an interest in the criminal jurisdiction, and to evidence that he was Clerk

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of the Court: the Clerk, who officiates, hath his place by Deputation from him, and is called Deput to my Lord Justice-clerk; nor could he deput Clerks, except he were principal Clerk. But I believe this invasion, has been made by the Justice-clerk, upon that Court, after he was created an Officer of State; but to solve this doubt, my Lord *Rentoun*, at his admission, is found, by Act of the Secret Council, to be a Member, and one of the Judges of the Justice Court, and to have a Vote there, the 10. of *December* 1663. and now he sits in the Justice-generals Chair, when he is absent.

The Justice Court have a Seal, which they append to publick Acts, and is kept by the Justice-clerk-deput. This Deput is admitted by the Justice clerk, by way of Commission, giving him power to be Clerk to all Courts, holden by His Majesties Justice-general, or Deput, or any having particular Commissions, either at *Edinburgh*, or else where: and therefore no Justice Court, either in the border, or elsewhere, is lawful; except it be served either by the Justice-clerk-deput, or any having Commission from him. It seems, that of old, the Writers to the Signet, did use to write criminal Letters, without receiving Caution; but that discharged by the 34. *Act 4. Par. Fu. 5.* And now, though Writers to the Signet may subscribe the Letters, yet the Justice-clerk-deput can only write the deliverance upon the Bill, and receive caution. And therefore he writes upon the Bill, every is found; and subscribes the same. His receiving caution is likewise warranted, by the 78. *Act 6. Parl.*

V. The Justices are only judges competent to these crimes, which are call'd *placita corona*, the Pleys of the Crown, which are four with us, wilful Fire raising, ravishing of Women, Murder, and Robbery, or Reit, 1. *Malcol. 2. cap. 13.* and the cognition of these belongs not to Burghs leg. burg. c. 6. nor to

no other inferior Courts, *Quon. Attach. c. 76. leguntur. St. Alex. c. 14. famina efforcata arisione rapina & murdrum.* *Me. lineus in stil. cur. paris part. 1. c. 13.* observes, that in France, three crimes belong to the cognition of the High Justices, wilful Fire, ravishing of Women, and Murder; nor can any other Judge proceed to judge these Crimes, except they be particularly warranted by a Gift from His Majesty, to that effect, *skene verb. murder.*

VI. The Justice Court has its Macers, in which they are not stented to a particular number, and though of old amongst the Romans, a pursuer might by his privat authority and voice draw the defender before the judge, *in jus rapere, in jus trahere*, which they borrowed from the *Grecians*, as they did most of their Law, for *Demosthenes*, their great Lawyer, tells us, *ὁρᾷ καὶ ἀριστοκράτης πῶς ἐν εἰσι τὸ ἐπὶ πολλὰς οὐδὲ δ' ὧ δὴ τὰν τοιούτων* &c. Yet ordinarily, even the *Grecians* had their *εἰσαγγελλοῦντες*, or Apparitors (as the *Romans* call'd them) who were the same with our Macers, *qui volentes vocabant recusantes urgebant*. The Mace used by these with us in the Justice Court, is a Iron Rod, which was the symbol of power, as appears by the *verse 2. Ps.*

The Coroner was an Officer, who took inquisition of Murders, in *corona populi*, the Laird of *Ednam* was the heretab Coroner in *Scotland*; but this Office is absolet now, except at *Justice Airts*, where the Coroner yet presents all Malefactor and takes them to, and from Prison.

TITL

T I T L E X V I.

The Jurisdiction of the Justices over
Souldiers, and of Mi-
litary Crimes

When are the Justices Judges to Souldiers.

A debate concerning free quarter.

Haddo's case.

Sometimes Commissions are granted for trying Souldiers.

How deserters are punished.

*Who were Judges competent to Souldiers amongst the Ro-
mans.*

Albeit Souldiers should be tryed by a Court martial,
for crimes committed by them, in a Military capaci-
ty, as deserting their Colours, resisting their Officers, &c. yet
when they commit other Crimes, they are lyable to a tryal
before the Criminal Court. For as *Voet*, observes, *delicta mi-
litum sunt vel communia, vel propria, lib. 2. de remilit.* And
French, and two other Souldiers under *Morgan* in the En-
glish Garrison of *Leish*, were put to the knowledge of an in-
feriour Justice, for killing a Burgesse of *Edinburgh*, albeit *Morgan*, offer-
ed to repledge them, *January 1662.* and yet in *anno 1666.*
the Justices would not proceed against some Gentlemen, for the

slaughter, because they were both Souldiers, but it seems the Crime should have been tryed before the Justices, seeing the crime, and not the persons determin the Jurisdictions, and their Crimes was only a Combat, which is no specifick crime to Souldiers: and this is conform to a decision, *Novemb. 1627.* Where Captain *Bruce* having been pursued for killing Captain *Hamiltoun*, did petition the Council, shewing them that this crime was committed in *Flanders*, and that he was assolized theretra by a Council of War, upon which probation the Council commanded the Justices to desist. But Sir-*William Bollanden* being challenged before the Council, for many R-yots and Crimes committed when he was in the West, they would not remit him to a Council of War, albeit that declinator was proponed. *August 1667.* And Militia Souldiers were judged by the Justices, for Murder committed by them in the execution of other Officers commands. the 3. of *February, 1674.*

II. The most considerable Military questions, which I remember in all the Adjournal books: are first, that which was debated, 5. *Decemb. 1666.* the case wherof was, some west country men had formed themselves in an Army, and were declared Traitors by the Council, and being thereafter beat at *Pentland hills*, Captain *Arnot*, Major *Mackulloch*, and others, were taken, by some of his Majesties inferior Officers upon quarter, but being pannelled before the Justices, as Traitors, it was alledged for them, that they could not be put to the knowledge of an inquest before the Justices, because they having been modelled in an army, and taken in the field fighting as Souldiers, they behoved to be judged by the Military Law, and by that Law, such as get quarter in the field, are by that quarter secured therein for their lives, and cannot be hereafter quirelled. To which it was replyed, that there can be no quarter, but where there is a *bellum iustum*, and it is not the num-

ber, nor form of the Army, but the cause that makes *bellum justum*, and publick insurrections of subjects against their Prince, are rather Sedition, then *bellum*; and these insurrections, being Treason, none can remit Treason but the King, and therefore quarter could not be equivalent to a remission, but all the effect of quarter in this case, is to secure these who get the same from present death. To which it was dplyed, that all who got quarter from any who are authorized to be Souldiers, are by that quarter against that authority from whom these Souldiers derive their power, and these who get the quarter, are not to dispute, whether these Souldiers had a sufficient power to give quarter, or whether *bellum* be *justum* or *injustum*, for that were in effect to destroy quarter in all cases, and to make all such as take up Armes, to be desperat and irreclaimable; and the power of giving of quarter is naturally inherent in all Souldiers, as such: and as the Council, without expresse remission from the King, upon submission might have secured their lives, so might Souldiers by quarter, for they have as much power in the field, as the others at the Council Table. 2. Lawyers are very clear that quarter should be kept, though given to subjects, who are Rebels, *Grotius lib. 3. Cap. 19.* where after he hath fully treated that question, *de fide servanda*, concludes, that *fides data etiam perfidis & rebellibus subditis est servanda.* And this hath been observed in the civil Wars, in *Holland* and *France*, and by his Majesty, and his Father at home, during the late troubles. 3. Quarter is advantageous to the King, and so should be kept, for these who were taken, might have killed his Majesties General or Officers, and by giving quarter to his enemies, he redeemed his Servants; and if the only effect of quarter, were to be reserved to a publick tryal, none would accept quarter.

Notwithstanding of which reply, the defence was repelled, and the Pannels condemned, and thereafter execute.

The second question was, that which was debated in *Haddoes*
K k k

do's case, 16. March 1642. At which time that Loyal Gentleman *Haddo*, being pursued, for killing Mr. *James Stalker*, Servitor to the Lord *Frazer*, he alledged that the said Mr. *James* was killed in the open field, in a conflict betwixt the Covenanters, and Ante-Covenanters: All which Acts of hostility were remitted by the pacification. To which, it was replied, that the Pacification did only secure against acts of hostility, which were done *in furore belli*; but this was a privat murder; for the said Mr. *James* having been taken a Prisoner, *Haddo* did come up to him, and asked whole servant he was, and hearing that he was servant to the Lord *Frazer*, he said, your masters man is the person that I am seeking, and thereupon ordered to kill him, which was accordingly done; by which it clearly appears, that this was a privat murder done in cold blood; and upon premeditated malice, and Mr. *James Stalker*, being a Prisoner, any who killed him, was liable for his murder, *ex jure militari*, and the pacification could no more defend the committer, then if he had gone into a prison and killed a prisoner, or if he had committed a Rape upon a woman; likeas Murderers are expressly excepted from the pacification. 2. *Haddo* was no general person, and so could not give order for his execution; and so the killing of the defunct was not warrantable by the Law of Armes. To which, it was duplyed, that the pacification did secure against all deeds whatsoever done upon the field, by persons engaged in either party, without debating, whether the deed was lawfully or unlawfully done, and the occasion, and not the manner of killing; is to be considered. And as to the manner, it is answered, that Mr. *James* had never got any quarter, and so was not a Prisoner in War; and therefore might have been killed by any engaged in the quarrel, whether general person, or other. But the truth is, the said *Haddo* did command that party which was equivalent to his being a general person; and albeit the pacification did expressly except murders, yet that behaved only to be interpret of such murders,

as had no contingency with the troubles, nor were occasioned by them: this debate was not decided, but was remitted to the Parliament; and that worthy Gentleman executed, for rising in arms against the Estates of Parliament.

III. I find, that there was a Commission granted by the Parliament, in Anno 1644. to two Bailies of *Edinburgh*, to sit, and hold Justice Courts, upon such Souldiers, as were runaways, and that upon this Commission, *James French* was condemned by them, for running away from his Collours, contrary to the Act of Parliament 1644. and was hanged accordingly. From which, these observations may be made, 1. That the Justices are not Judges competent to crimes, that are merely Military. 2. That we have no standing Law for executing runaways, beside the Martial Law; nor was there any Law founded upon this inditement, except the Act of Parliament 1644. which is now abrogat. 3. It is observable, that one Mr. *Alexander Henderson*, as Procurator Fiscal, and not His Majesties Advocat, was here pursuer. From all which, it seems somewhat strange, that this Process should have been insert in the Adjournal Books.

IV. But albeit deserters were here punished with death; yet *regulariter milites gregarij*, or listed Souldiers, are only punishable in time of Peace, with degradation, and in time of War, with death, because the hazard is then greater, *l. 5 §. 1. ff. de milit.* and by that Law they may be killed by any man, *lib. 2. Cod. quando liciat. unis. &c.* But this arbitrary killing is not now in use, as *Voet de jur. militat.* very well observes, if superiour Officers leave their charges, they commit Treason, *l. 2. ff. ad leg. jul. majest. vid. tit. Treason.*

V. *Constantine*, having extinguishd the Office of *praefectus praetorio*, who was the Supream Judge in all Military cases, The *Magistri militum* succeeded, and were sole Judges of all crimes committed by Souldiers, both in Civil, and in Military

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tary cases; and if Souldiers had offended, the Civil Magistrate might have secured, but he was obliged to remit them, *cum elogio*, to their own Officers, *l. 9. ff. de custodia reorum. vid. tit. C. de remilit.*

TITLE XVII.

Advocations of Criminal Causes.

1. *Advocations defined.*
2. *No Advocacion from the Justices.*
3. *How Advocations are raised from inferiour Courts, and the forms thereto relating.*
4. *The ordinary Reasons of Advocations examined.*
5. *Whether the Justices are proper Judges to their own competency.*

1. **A**Dvocacion is the away calling of an intended cause, ^{per} pursuit, from an inferiour, incompetent judicator to a higher, and more competent; and is the same thing with

Magi-
them,
or.vid.
us, that *recusatio judicis*, was with the Romans, and is by
the Doctors, call'd *advocatio*, or *evocatio*, which is by them
defined to be, *litis pendentis coram inferiore ad superiorem abs-*
que provocacione facta translatio Gail. lib. 1. obs. 41, num. 7.
and is founded upon *cap. ut nostrum de appell.* & *l. jud. solvi-*
mus ff. de jud.

II. Their is no Advocation raised of pursuits, intended be-
fore the Justices, but if ther be any design of stopping a pur-
suit depending before them, there useth to be a Petition giv-
en in to the Lords of Secret Council, who, if they find the
desire of the Petition just, will ordain the justices to stop all
further procedor, or will remit the inquiry to any other Court,
as they did in a pursuit, intended at the instance of the Earl
of Caithness, against some Vassals of the Earl of Sutherland,
which they stopt, as to the Earl himself, and ordained his
Vassals to be pursued before his own Regality Court: some-
times also, they ordain Assessors to be Justices, so that there
is never a cause formally Advocat, from before the Justices;
albeit those courses, and Repledgiations be equivalent to Ad-
vocations.

III. Advocations may be rais'd from inferiour criminal
judges, by the Lords of Session, as in the case of Theft-
boot, before the Sheriff of Inverness, and Advocat by the
Lords, because of the intricacy of the case; albeit, it was al-
so judged there, that the Lords were not Judges competent, in
such Advocations, because they could not be Judges to the
crimes pursued. To which it was answered, that though they
could not be judges themselves, yet they might remit the pur-
suit, to these who were competent; even as Brieves raised,
for serving a person Air, may be Advocat to the Lords, who
may remit the case to another Inquest: But Durhie observes,
the 9. of January 1629. that Kincaid of Waristoun, craving
that the Process against him, for slaughter, might be Advoca-
ted by the Lords, to the Justices, because of the ignorance
of

of the Barron Bailie, or else that they would grant Assessors; the Lords continued the Diet, till application should be made to the Council, but if the Council would not interpose, then they should do justice therein, by remitting the same to the Justices, or otherwise. But Advocations in criminal cases, are ordinarily raised by the Privy Council, who have the most natural power in such cases.

Advocations are raised upon Bills, and the Letters pass the Signet of the Session, if the Bills be past, by the Lords of Session; or of the Council, if the Bill be past by the Lords of Council.

This Advocation must be execute by a Messenger, and a full Copy must be given of the Letters, as in other Summons; for in effect, an Advocation is a Summons, and the Diets in Advocations are peremptor, as in all other criminal pursuits: Neither is the Advocation given up to see, as in other criminal pursuits, at the day of compareance; and therefore a full Copy should be given, to the end, the defender may be ready to answer. The pursuer of the Action must be cited, and the Judge from whom the Action is to be Advocat, must be also cited, to the effect, he may defend his own jurisdiction; and if both these be not cited, the Advocation will not be sustain'd.

When the day of compareance comes, if the Advocation be raised before the Session, it is called before the Session, and if the reasons of Advocation be found relevant, the cause is remitted to the Justices; but, if that Advocation be raised before the Council, it is called before the Justices, and they are Judges to the relevancy of the reasons, and both pursuer, and defender, must prove all that they alledge instantly.

The Advocation of a criminal pursuit, doth contain the reasons upon which it is founded, as in civil Advocations; but though *in civilibus*, the raiser of the Advocation will be allow

allowed to add a reason, though it be not libelled, which is called an eiked reason; yet that is not allowed, *in criminalibus*, because all must be proved, *instante*, and the defender is not able to prove his answer instantly, if he know not what is the reason, which he must answer, whereas, *in civilibus*, he will get a term to prove his answer, to the eiked reason.

IV. The ordinary reasons of Advocation, are, 1. Consanguinity, or Affinity within degrees defendant, viz. consanguine german, or nearer, for whatever is a sufficient reason to cast a Witnessse, should (in my opinion) much more be sufficient to decline a Judge, since there may be penury of Witnessses, so that the Witness challenged may be necessary; whereas, if a Judge be suspect, he may be supplied by another Deput, or a superiour Judge; and a Judge may by himself, ruin a Cause, which one Witnessse cannot do; and though we have no expresse Law for this, yet the Lords encline ordinarily to sustain this, and particularly in the Moneth of Decem. 1676. *Ross contra Collodine*, where a Decreet was turned in a Libel, because, pronounced by a Nephew, albeit it was there challenged, that by the 212. *Act*, 14. *Parl.* *f.* 6. a Brother, Father, and Son, were only to be declined as Judges: for that Statute relates only to the Lords of Session, who, because of their great Eminency, and Trust, are not to be as easily suspected as interiour Judges.

It may be doubted, whether the Justices, or any of them, may be declined, as within degrees defendant; for though they must now be Senators of the Colledge of justice, yet they sit not there as such, nor are the Justice-general, or Justice-clerk alwayes of that number; but yet I think, that since the Justice Court is a supream Judicatory, in its own kind, and that this respect that is put upon them, is, because of their Eminency, and presum'd integrity, that therefore they being the same persons, ought to have the same privileges;

viledges, and the Justice-general, and Justice-clerks being superior in order to the Lords of Session, who are Justiciars, ought at least to have as great trust: but though the Admiral be a supream Judge also, yet it may be doubted, if this Statute should be extended to him; because men of meaner parts may officiat there.

It may be also doubted, whether this declinator against fathers, brothers, and sons, should extend to the degrees of affinity, as well as those of consanguinity, so that a father, or brother in Law may be declined, and though the Lords lately would not decline one of their number, though brother in Law to the pursuer; yet it may be argued, that albeit Acts of Parliament must be strictly interpreted, yet where there is a parity of reason, and the words may in propriety admit of the extension, there the extension is to be allowed; but so it is, that here a brother in Law, is to be suspected, and a brother in Law, is in propriety of speech, a brother: Likeas, since witnessses may be cast upon the suspicion of affinity; why may not Judges: especially seing in the Statute 1621. against dispositions made by Bankrupts: and in the opinion of Lawyers, degrees of affinity, and consanguinity are still equiparat, and so likewise are we in this point, that a pursuite, at the instance of a Procurator-fiskal, was Advocat upon this Statute, because the Procurator-fiskal, was brother to the Judge, though he was only pursuing *ratione officii*, and had no interest himself, and expressly renounced all interest in the pursuite, 28. *Januarii*, 1629.

Whether this statute is to be extended to unlawful relations; so that a Bastards brother, &c. may be declined, vide my observations upon the Statute 1621.

Another reason of Advocation like to this, is that one of the members of the Court is pursuer; as for instance, if the pursuite is at the instance of one of two Sheriff-deputs, before his own colleague: *habet quippe Societas jus quoddam fraternitatis*.

latis in se l. verum ff. praesocio vid. c. insinuante de offic. deleg. & cap. Post. de appel. and that none should judge where the colleagues pursue; but that the pursuit shou'd be carry'd away to another Judicature, is appointed by a Statute in *France*, anno, 1560. but we have no such Statute, and one colleague with us, may be witness for another, and why not then Judge.

A third reason of Advocation is, that the Judge is suspect, as if he had given partial counsel, or if he has repelled a just defence, or as being severe, above what the Law allows. 4. That he is incompetent, the case pursued being only proper to be try'd by the Justices, as being one of the four Pleys of the Crown, *viz.* Treason, Murder, Fire-raising, and Ravishing of Women; but sometimes, though the first Libel have int'ressed Treason, as in the case of *Peddies*, *January*, 1667. yet if the pursuer will restrict his action to damage, and interest; but will desert the dyet as to the criminal pursuit it may be sustain'd. 5. That the case is very intricat, as in a pursuit of Theftboot, which was Advocat from the Sheriff-deput of *Inverness*, *ex capite*.

Members of the Colledge of Justice also pretend, that they cannot be pursued before any other Court, because this would draw them from attending the Session, but the *Act* 39. *Pa.* 6. *Q. M.* whereon this is founded, seems only to hold in Removings, so that no Action concerning Removings, should be Advocat, but in these cases, *viz.* deadly fead, where the Judge ordinary is party, or the defender a member of the Session and yet *de praxi*, that part of the Statute is extended to all Advocations But they cannot Advocat from the Justice Court.

If the cause be Advocated, the pursuer of the first Libel, which is Advocated, must find caution *de novo*, to insist in the pursuit, else the Justices will desert the dyet, which caution is necessary, because the Judicature before which the caution was found, is altered, and neither the pursuer, nor his cau-

tioner, are bound to insist before any other court.

The defender likewise of the first cause, and who raised the Advocacion, is obliged to renew his caution, that he will underly the Law, else the Justices will imprison him.

The raiser of the Advocacion must intimat to the pursuer of the principal cause, that he has raised an Advocacion, to the end, that the said pursuer may be ready to insist at the day, to which the advocacion is raised, and when the Procurator-fiskal, is the pursuer before the Court from which the cause is Advocated, the raiser of the Advocacion should intimat to His Majesties Advocat, to the end he may be ready to insist, for His Majesties Advocat is in the Justice-Court, what the Procurator fiskal is in inferiour Courts: The office of both, being to pursue *vindictam publicam*.

V. The old custome was (as some alledge) that the Lords of Session judged all the Advocations, which were raised in Criminal causes, from inferiour Judges, even to the Justice Court: and very judicious Lawyers do yet hold, that the Justices cannot judge, whether they be competent Judges in causes Advocated from inferiour Criminal Courts, but that the Lords of Session should cognosce, whether the cause should be Advocat: and if they sustain the reason of Advocacion, that they should remit the cause to be tryed by the Justices, or remit the tryal to the Court from which it was Advocated; if the reason of Advocacion be not relevant: for they think it unreasonable, that the Justices should be Judges of their own competency; but since the Justices are supream and sovereign Judges, as well as the Lords of Session, and since the Justices are now many, and are Lords of the Session also, it seems reasonable, that they should be Judges to their own competency, especially since these reasons of Advocacion do very frequently dip upon Subtilties of the Criminal Law, and cannot be well judged, but by such as understand that Law exactly: as for instance, I have seen an Advocacion raised of a Li-

bel in the case of Treason, from before a Lord of Regalities Court, upon this reason, *viz.* that the ground of the accusation was for drowning a Coal-heugh, which was Treason in our Law, to the which crime of Treason, none but the Justices were Judges competent. In which Advocation these points were necessarily debated, 1. Whether Lords of Regality were Judges to Treason. 2. Whether though they were Judges competent to Treason, founded upon the common Law, yet if they were Judges to Statutory Treason. 3. Whether though burning a Coal-heugh was Treason by Statute, yet if drowning of it fell under that Statute: all which points were *indagationis criminalis*, and these who could judge such points, might judge any criminal case: Likewise, both by the old and new stile of Advocations, raised either by the Council, or Criminal Court, the Letters bear, that the reasons are to be seen, and considered by the Justices, and immediately upon the Advocation, caution is found in the books of adjournal, and to answer before the Justices, and the Justices have been in constant possession of judging such reasons.

And whereas it may be alledged, that though the Lords of Session are not Judges to crimes, yet the case of competency, in the matter of Jurisdiction is meerly Civil, and so it would seem proper to be judged by the Lords, especially since it is not just, that the Justices should be Judges in their own cause. To which it may be answered, that though this case be civil, yet it has so necessary a contingency with what is criminal, as I have observed, that they ought not to be divided, since the Lords of Session are Judges competent to Advocations, wherein their own Jurisdiction is controverted, why should this be denied to the Justices, who are a part of themselves, and such supream Judges, are above suspicion, especially since they can gain nothing by their Jurisdiction.

TITLE XVIII.

Of Inquisition.

1. *The nature of Inquisition, and when it is competent.*
2. *The King and Party may pursue separately.*
3. *Citations, super inquirendis, when competent.*

I. **W**HEN a crime is committed, the Council, or the Justices, did of old, take a previous Inquisition of it, by examining Witnesses, and taking such other information, as they thought fit: And these depositions, and examinations, are called *informationes* by the Doctors; but though they may examine Witnesses, before the intenting of a criminal pursuit: yet after it is once intended, the Justices found the 8. of January 1672. that they could not examine Witnesses; for the Inquisition ends by the intenting of the pursuit, & *ubi incipit accusatio desinit inquisitio*.

The Doctors are very profuse on this subject, but I shall only excerpt from them, what is most suitable to our forms and practice; they define Inquisition to be an information of the crime, taken by the Judges own authority; & *ex officio*: and they divide it in a general Inquisition, which is taken of the crime in general, without taking notice of any particular informer, or defender. And a special Inquisition which is taken against a particular person, of whose guilt they are in-

formed.

formed. By the Civil Law, no Judge could proceed against any privat person, without an accuser; for Inquisition was by that Law, an extraordinary remedy, and no recourse could be had to an extraordinary remedy, till accusation; which was the ordinary remedy, were first tryed. But by the Canon Law, Inquisition was declared to be an ordinary remedy: and all the Doctors conclude, that generally, a Judge may now, by the practice of Nations inquire, *ex officio*, in all crimes, *Farin. de inquisit. quest. 1. num. 10.* which is consonant to our Law; by which the Council, or Justices, may inquire into all crimes, without waiting for an accuser, which is done with us, without citation of the party, or other formalities; but nothing can follow, till after information be taken, an Enditement, or Summonds be raised, which is followed according to the ordinar rules. But yet, I think, that the Judge should not enquire, or take any previous tryal, even in our Law, where an accuser offers to insist, except he has just reason to fear collusion, for *non recurrendum est ad extraordinarium remedium dum locus est ordinario*: and albeit Inquisition be declared by the Doctors, to be an ordinary remedy, yet it is only declared so, to the effect, that a Judge may inquire, without any accuser, and that the Inquisition taken, be not *ipso jure* null; but naturally, every man should have liberty to pursue the privat wrong done to himself, which may be prejudged, either by the want of information, or zeal of the Judge ordinar, and sometimes by collusion; and thus I have seen many Decrees, of interiour Courts, wherein the defender was by collusion, find at the Procurator-fiskals instance, reduced by the Lords; and not obtain'd by the Council; when it was alledged, that the party wronged appeared, and offered to pursue; but was not admitted. And albeit, because of the wrong which is done to the publick, a Judge may likewise inquire: yet he who is

prin-

principally wrong'd, should be allowed to be chief in the prosecution. And therefore, albeit the Council may in publick crimes, where the peace of the Countrey is chiefly concerned, take precognition of it, and stop accusations, raised before the Justices, at a privat parties instance, as they did in the pursuit, at the instance of the *Stranawer* men, against the Earl of *Caithness*. And others for Fire-raising, and Depredations, in August 1668. yet they refuse to stop accusations, and will not grant precognitions, in privat murders, or such like crimes, where privat persons are principally wronged, except the rigour of Law require some abatement.

II. It appears also, that pursuits at His *Majesties* instance are only subsidiary, *Fa. 1. Par. 13. cap. 140.* by which Act it is clear, that crimes may be punished at the Kings *Majesties* instance, if no privat follower appears, and *Fa. 6. Par. 11. cap. 76.* where it is Statute, that the Thesaurer, and Advocat, may pursue privat crimes, although the parties be silent, or would agree. From which Acts, two things may be concluded, 1. That of old, it was doubted if the King could pursue privat crimes, without an accuser. 2. That pursuits at His *Majesties* instance, for privat crimes, are yet only subsidiary, and allowable, if parties be silent, or collude. Which distinction, doth in my oppinion, solve that great debate amongst the Doctors, *utrum accusatio cessare facit inquisitionem.*

Nota, that albeit by the said Act, it is Statute, that the Thesaurer, and Advocat, may pursue without concurrence of the party; yet *de practica*, the pursuit is only raised at the Advocats instance, and so the particle (*and*) seems to be disjunctive, as *and* is very oft in the Civil Law. And it is probable, that a pursuit at the Thesaurers instance, would be staid, without concurrence of His *Majesties* Advocat, if the Advocat should refuse his concurrence

III: The Doctors conclude, that a Judge cannot enquire summarily, & *necesse est ut, vel indicia, vel delator, vel diffamatio aperiant viam inquisitioni*, for else every Judge might diffame the best and most innocent men, at their pleasure, so that if a Judge have not some rise for his inquiry, I really believe he is punishable in our Law, for putting a person to Inquisition for a crime, & *sindicandus est ex eo capite*, but the malice of the Judge must be very clearly proved in that case.

Of old, Judges did appoint Delators, who might inform, *denunciatores dicebantur*; but of late, this employment doth belong to the Fisk, & *eius sindicis*. And by our Law, to His Majesties Advocate, in the Justice Court, and to the Fiscal, in interiour Courts; and they may pursue, or inform in Inquisitions, *sine pana calumnie quia cessat in iis suspicio calumnie ex eo quod denunciant ex officio*.

By the 13. Act 10. Par. Fa. 6. Charges *super inquirendis*, are discharged, but it is a mistake to think, that by that Act, the King, or other Judges, cannot examine men, without a formal Process: for the design of that Act, is only to discharge the denouncing men Rebels upon such charges, without previous tryal; and yet if the chief Officers of State, or at least some of them concur. It would seem that by that Act, even such charges are yet lawful. And where the King, or Magistrate has previous information of crimes latent; it were against the interest of the Common-wealth, that they should not be allowed to clear themselves of these, by particular interrogations.

TITLE

TITLE XIX.

Of Accusations, and Accusers.

1. *The difference betwixt an accusation by way of Summons, and an inditement.*
2. *Who may accuse, by our Law.*
3. *A minor cannot pursue without the consent of his Tutors and Curators.*
4. *In what cases a woman may pursue.*
5. *Whether a person excommunicated, or at the horn, may pursue.*
6. *Infamous persons cannot pursue, and who are such.*
7. *Whether moe crimes may be pursued at once.*
8. *The pursuer must find caution and be punished, if he be calumnious.*
9. *The pursuer must aliment.*

1. **A**fter inquisition is taken (which is not necessary, but still arbitrary with us) the party is either imprisoned, and then he is proceeded against by way of inditement, or he is still at liberty, and then he is proceeded against by a formal Summons. *Inditement* comes from the French, *enditer*, *deferre nomen alicujus*, and by the Law of England, it differs from accusation, in that an inditement must be always at the

Kings instance, and is but a bill, and the preferer of the bill is no way tyed to the proof of it, upon any penalty, except there be conspiracy, *vid. Blunt. dict. Angl. verb. enditement.* But an enditement with us, is a scedule containing the accusation given to the defender, so called, as *Skeen* sayes, from the French word *dict tu*, what sayest thou, for after the inditement is read, the Judge asks the Pannel what he can answer to it, and it differs only from a Libelled Summonds in that it begins thus, *A. B.* Ye are indited and accused, that albeit by the Laws, &c. yet, ye, &c. or thus, forasmeikle, as by such particular Acts of Parliament, &c. Murder, &c. is prohibit, and the pain declared to, &c. yet you, *A. B.* did upon the 27. day, at least moneth, &c. And it is writ only by the Justice Clerk, without a bill, and passes not the Signet, nor needs it be executed with the solemnities requisite in Libelled Summonds by Messengers in ordinary crimes, and Heraulds in Treason, but may be given by the Clerks servant, as was found in a pursuit of Treason, pursued by way of indictment against *Mackulloch, Gordoun,* and others, 5. Decemb. 1666. it needs not likewise these, *inducias deliberatorias*, allowed to such as are at liberty, and are pursued by a Libelled Summonds, but a day or two is sufficient, and sometimes they may be pursued without any time to be allowed, for this procedure is in effect the same with that inquisition specially treated of by the *Civilians*.

There is likewise this difference betwixt an inditement, and an accusation, that an inditement properly is a Libel raised at the Kings instance, and not at the instance of any privat person, for in accusations, or Libels raised at the instance of privat persons as pursuers, there must be a formal libelled Summonds under the Signet, *10 cap. 1. R. M. lib. 1. num. 7. & 8.* it is said, that Theft and Murder by inditement belongs to the justice, because there the King or his Advocate pursues, but where a certain accuser appears, a pursuite upon these Crimes may be intended before the Sheriff, and *Skeen* upon that Chap-

ter, and likewise upon the 2. cap. num. 2. *David Stat. 2.* does observe, that all Criminal accusations are either by an indictment, or by a certain accuser; and from this difference ariseth that other difference, that *crimen per indictmentem*, is only pursuable before the Justices, which is clear both by the forecited places, and the whole tract of the books of *R. M.* But this last difference is now absolet, for of late before the Sheriff, or at interiour Courts, malefactors may be pursued, either by a libelled Summonds, at the instance of any particular accuser, or at the instance of the Procurator-fiskal, by way of indictment; which practise is most reasonable, for it were against the interest of the Common-wealth, that Sheriffs, and inferiour Judges, whose great duty, and chief imployment it is, to advert to crimes, should not have liberty to pursue, without the concurrence of an accuser.

It is indeed the interest of the Common-wealth, *ne crimina mancant impunita*. And therefore in Crimes which immediately concern the welfare of the State, such as Treason, Sedition, &c. every man may be an accuser, but it is likewise the advantage of every privat person, that it shall not be lawful to every malicious enemy, upon the pretence of a publick good, to trouble and vex such against whom they carry malice, upon a pretence of a criminal pursuit, and therefore according to the the common Law, *in privatis delictis non admittebatur ad accusandum, nisi qui suam aut suorum injuriam insequeretur*: and *Farinac. states suorum injuriam*, to extend, *ad quantum gradum*, and it seems to be extended with us within degrees defendant, and that every person may not in our Law, pursue any privat crime, appears from the former Chapter.

III. A Minor may not by the Civil Law accuse, without the consent of his Tutors and Curators. And where it is said, *l. 4. R. M. c. 2.* that a Major being of lawful age, he may accuse, it insinuates, that Minors regularly cannot accuse.

And

And suitable to this, the Justices refused to grant proceffe, at the instance of *William Umphray*, against *John Meldrum*, because the said *William* was Minor, and had no legal concurrence, 29. of *July* 1597. which is founded upon most convincing reason, for Minors may by ill governed youth, and imprudence, either pursuing unjustly such as are most innocent, or else by managing unwisely the Criminal pursuite, if it were competent to them, they might prejudice both themselves and the Common-wealth, in suffering the defender to be cleansed by a verdict. After which Absolvitur the defender could not be again brought to a tryal, nor would the Minor be restored against the sentence, and yet a Minor may crave at the Barr, that the Justices would allow him Curators, *ad lites*, which desire, the Justices will grant, 24. *July* 1600. *Spence contra Bannatine*.

IV. A woman according to the Civil Law, could not accuse in no case, except where she was revenging the injury done to her self, husband, or relations; and in the former Chapter it is said, that a woman can accuse none of felony, except in some particular cases, which appears to be by the 5. chap. num. 8. the Murder of her own husband, *quia una caro fuerunt vir & uxor*, and N. 9. it is generally ordained, that a woman may be allowed to pursue any injury done to her own body. From which we may generally conclude, that she may pursue, *suam sed non suorum injuriam*, wrongs done to her self, but not wrongs done to her relations.

V. Whether a person at the horn, or excommunicat, may pursue, appears to be debateable, for the one opinion it may be alledged, that it is for the advantage of the Common-wealth, that crimes remain not unpunished. 2. Civil Rebellion, or excommunication, *non tollunt jura natura*, amongst the chief whereof, Lawyers esteem the liberty of pursuing the wrongs done to relations, and much more the wrongs done to ones self, in his person or good name. 3. Such as are Re-

bels for Civil pursuities, *non possunt impune offendi*, and therefore it appears most reasonable, that they should not be debarred from pursuing wrongs done them; for if a person at the Horn, could not pursue the wrongs done him, then any person might injure him at pleasure, seeing the fear of pursuit, and the punishment depending thereupon, is that which ordinarily overaws the pursuer; but on the other hand, it may be alledged that, 1. By the 11. cap. Stat. Will. These who condemn the Statutes of the Church, shall not be admitted to accuse. 2. It is a Rule in Law, that *frustra legem implorat qui contra legem peccat*. 3. A person at the horn, is by the English Law, alwayes and oftentimes in our Law, said to be outlawed, and to be outlabeled, imports the losing all the privileges of Law; and in our Law, they are said, *non habere personam standi in judicio*. Nor puts our Law any distinction betwixt Civil and Criminal causes: for reconciling which difficulty, it may be alledged, that there is a distinction betwixt the being outlawed for a Criminal or Civil cause, and that these who are denounced Fugitives upon any Criminal accompt, cannot be pursued till they be relaxt, which is in contravertedly true in our Law; seeing if a person be denounced for not finding caution for his appearance, to underly the Law, he will not be admitted to propon any defence till he be relaxt; but though a person be at the horn for a civil cause, it appears most unreasonable, that because a person is not able to pay a great Sum, for which he is denounced, that he shall not therefore be admitted, do defend his own innocence against a crime laid to his charge. It seems likewise reasonable, that some distinction should be made, betwixt a pursuer and a defender in this case; for it seems unreasonable, that he who accuses another for a crime, should debar him from self-defence, though the debarring him from pursuit, be not so unfavourable; and upon this accompt, in a case betwixt *Ninian Spence* and *Hector Bannatine*, the Justices found, that the pursuer

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lier in a Criminal pursuite, could not by horning debar à de-
fendendo, the person whom he himself had called. It may be
likewise alledged, that though the Kings Advocat may debar
Pannel from his defences, when he is at the horn, that no
privat party can, seing they are not prejudged by the Rebelli-
on, as the Fisk is; but this last distinction, is rather reason-
able then legal, and therefore I mention it rather as a good
conjecture, then a standing Law.

VI. Infamous persons cannot accuse, according to our Law,
and what persons are accompted infamous, is particularly enu-
merat in the foresaid 11. cap. Stat. Willielm.

1. *Infames dicimus omnes illas personas esse, qui pro aliqua
culpa damnantur notabili.*

2. *Et omnes qui christiana legis normam abiiciunt, & ecclesi-
astica statuta contemnunt; omnes fures, sacrilegio.*

3. *Omnes capitalibus criminibus irretitos, Sepulchrorum vi-
olutores, Apostolorum, Successorumque eorum & Reliquorum
Sanctorum Patrum, libenter, violantes Statuta.*

4. *Et omnes qui adversus Patres armantur, qui in omni mun-
diparte, infamia notantur.*

5. *Similiter incestuosos, perjuros, homicidas, receptatores
malefactorum; adulteros, raptos, maleficos, de bellis publi-
is fugientes; et qui injusta vel indigna sibi petunt loca teneri;
qui sacra ecclesia auferunt facultates; & qui accusant, & non
proband, et qui contra innocentes principum animos, ad iracun-
diam provocant, & omnes qui pro suis sceleribus, ab ecclesia
expelluntur.*

6. *Et omnes quos ecclesiastica, & seculares leges infames pro-
nunciant: Item servos ante legitimam libertatem abeuntes,
publice penitentes, bigamos, omnes qui non sunt integro corpore;
qui sanam mentem non habent vel intellectum, qui furiosi mani-
festantur.*

7. *Hi omnes supra dicti, nec ad sacros ordines promoveri de-
bent, nec ad accusationem, vel Testimonium admitti.*

VII. A person accused, was not obliged to answer of old, but for one crime in one day, except there were several pursuers, *quoniam attachiamenta, cap. 65.* by which, accumulation of crimes was expressly unlawful, *sed hodie aliter obtinet*, for now there is nothing more ordinary, nor to see five or six crimes in one Summons, or Inditement, and to see one accuser, pursue several Summons; and yet seeing crimes are of so great consequence to the defender, and are of so great intricacy, it appears most unreasonable, that a defender should be burdened with more than one defence at once; and it appears, that accumulation of crimes is intended, either to lay the same of the defender, or to distract him from his defence.

VIII. To the end that persons may not be unjustly pursued, the Civil Law did appoint two remedies, 1. That the pursuer should find Caution to insist. 2. That he should be pursued as a calumniator, if his pursuit was found to be malicious. As to the first, the form amongst the Romans, was that the accuser was obliged, *de ferre nomen rei apud prætorē atq; se inscribat libello judici porrecto vel in codice publico, querela deposita cui inscriptioni subscribat & ad talionem se obligabat in casum calumnie.* Inscriptionis formula apparet, l. 3. ff. de accus. Consulibus illis, die illo prætorem illum Titius professus est se Merviam legem juliam adultæream deferre quod dicat eam, cum scio in civitate illa amo illius, mense illo, consulibus illis adulterium commissum. Which inscription was only necessary in atrocious, but not lighter crimes, *nam illa de plano discutebantur, l. levior de accus.* but in some cases, the necessity of inscription was admitted, even in atrocious crimes, as when a Woman, *rum injuriam persequitur & parentes filii necem & è contumacia*. And generally, where the pursuer could not be pursued for calumny, he needed not, *inscribere*, because, inscription was only necessary, to the end the pursuer might be punished.

ed; if he were found guilty of Calumny. Nor were these descriptions necessary in reconventions, & *ante categoriis*, because, in these, the pursuer intended not to calumniate, but only to defend himself, by recriminating the pursuer.

The inscriber was, according to the Civil Law, obliged to find Caution, *se perseveraturum in accusatione usque ad sententiam*, l. 7. ff. de accus. the reason whereof, is by one of the Greek *Scolasts*, said to be, *ὅτι μὴ εὐχερὲς τις κατηγορεῖται πρὸς ἑαυτὸν*. *ne facile quis ad accusationem per currat*. Suitable to this, our Law has ordained, that the pursuer, when he raises a criminal Libel, shall find Caution to insist, in the intended pursuit; and this Caution is found, either by the Cautioner enacting himself in the Journal Books, which Act is to be subscribed by him, or else if the Cautioner be absent, he sends a Bond, bearing a clause of Registration in the Journal Books, which accordingly therein Registrat; this Caution was first appointed by the 34. Act, Parl. 4. Ja. 5. by which, the Justice-clerk is obliged to take sicker surety, that the pursuer shall bring back the criminal Letters indorsed, and execute: that the Cautioner is not obliged with us (as he is by the Civil Law) that the pursuer shall insist, and the penalty appointed by that Act, is, an Earl, or Lord, two thousand Merks, a great Barron one thousand Merks, a Ferrier five hundred Merks, an unlanded Gentle-man two hundred Merks, a common man two hundred Merks: But of old, accusers behaved to find Caution to insist, *Reg. Maj. cap. 1. l. num. 6.* and if he cannot find a Cautioner; it is said there, that his oath may be taken, in all cases of felony; and the reason given, is, lest too much severity, in exacting of Caution, deter the prosecution of a publick crime; and it may be subtred, if *Cautio juratoria*; cannot properly come in under the notion of sicker security, and there can be little hazard to the Common-wealth, seeing the Law presumes, that

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His *Majesties* Advocat will be still so just, as to pursue the publick revenge, where the party is unable. Whereas, by admitting this, *cautio juratoria* *an* *a* *præbetur perjurio*, and the defender is disappointed of his damage, and interest, if the party fail. By the 29 *cap. Stat. Rob. 3.* pursuers before the Sheriff, should still find Caution to insist: but with us, those *ubi suam vel suarum injuriam prosequuntur & etiam in anticategoriis*, the accuser must still find Caution; wherein we do very reasonably differ from the Civil Law, for the defender is as much prejudged, and may be as easily troubled, if these pretexts were allowed, to palliat the pursuers malice as generally he could be in other cases: in this likewise we differ from the Civil Law, that the defender is obliged to find Caution for his compearance, which he is commanded to do by the Letters: by which the Messenger is commanded to denounce him Rebel, if within six dayes after the Summons is execute against him, he find not Caution in the Books of Adjournal, to the effect foresaid; which Caution, though it be found, yet if it be not intimat to the Messenger, the Messenger may still denounce him Rebel, for not finding of Caution. And though by the Civil Law, and our the Advocat may pursue without consent of the privat party yet he is not obliged to find Caution, *nam in eo non præsumitur calumnia*: yet the Advocat in our practise, doth ordinarily oblige his informer to find Caution, else he refuses his concurrence.

If the accuser be found to have been calumnious, or as our Law termes it, in the wrong, he is obliged to pay to the party, an unlaw of ten Pounds, *Fac. 3. Parl. 6. Act.* And if there be moe deeds then one, he is liable in twenty Pounds; and likewise to pay the defenders expence, *Act 7. Parl. 6. Fac. 6.* Which Acts, speaks only of not prevailing though there be no malice, and though there be no *probabile causæ litigandi*, but if their pursuit be found to be malicious

it is arbitrary to the Justices, to inflict what punishment they please, either in that same sentence, wherein the defender is absolved, or upon a separat Bill, or pursuit; as also, he is by the Justice constantly ordained to pay what damage, and interest, or expence the Justices pleases, both to the parties, and to the Assizers. And albeit, according to the Civil Law, *Procurator fisci non præsumberetur calumniosus*; yet si procurator fiscalis calumniose instigat judicem ad inquirendum tenetur in damna actione injuriarum & concremari debet, l. universi C. ubi causa fiscal, &c. And according to the opinion of the Doctors, *hodie & judex & procurator fisci affectate consequentes crimen extraordinarie sunt puniendi*, 2.

IX. The Justices ordain, that because many poor persons were maliciously, or ignorantly imprisoned, that the Magistrates of *Edinburgh* should imprison none, but where one should find caution, in the Books of Adjournal, to insist against them, and to aliment them; and that they should appoint a Procurator, dwelling within *Edinburgh*, to whom the Justices might intimat, when they desired the pursuer might insist, the 5. of *July 1661*. which should be done, and expedit very speedily; and for this end, the Bishop was appointed to visit the Prison every Friday and Wednesday, *et taxat reos, celeriter judicari. Basil. l. 21. de custod reor.*

TITLE XX.

Of Advocats and Procurators.

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1. *Whether a Procurator should be admitted for the pursuer in his absence.*
 2. *His Majesties Advocat may deput when he is pursuer, he has also other priviledges.*
 3. *In what cases Procurators are admitted in defence.*
 4. *What Oath of Calumny is allowed in Criminals.*

THE Doctors make a difference, *inter simplicem allegatorem*, who can only propon what is nortour, as that the party cited is known to be sick, & *procuratorem*, who must have a mandat, and may propon declinators, or dilators; & *defensorem innocentia*, who not only can propon dilators, but may likewise defend, *et Advocatus semper reputatur defensor*, and needs no mandat; but his Gown is his warrand, and yet in Criminals he must have a Procuratory.

I. According to the Civil Law, Procurators were neither admitted to pursue, nor defend, *l. ult. s. ad crimen ff. de publ. jud.* but by the Law of most Nations, a Procurator is admitted to pursue; for *pana talionis* is now taken away, which was the reason the pursuers personal presence was requisite. *Clar. fin. quest. 14. N. 22.* the defender must still be present, *ne judicium reddatur elusorium.*

With us, Procurators are admitted for the pursuer, and yet

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this appears not to want difficulty, for if the defender should desire, that the pursuer should swear the Libel, the dyet would desert, if this were refused by the Procurator, and though in *Civilibus*, a day may be taken to produce the pursuer, to give his Oath of Calumny, which Oath of Calumny is the same thing we call swearing the Libel in Criminals, yet seeing all Criminal dyets are peremptor, so that there cannot be a day allowed to the pursuer to give his oath, it were unreasonable but he should be present, for else the defender is precluded from a very great advantage, such as is the pursuers oath of Calumny, which if the pursuer himself were present, and refused, no pursuit would be sustained at his instance, likewise, if the pursuer were present, it might be referred to his oath, that he gave the witness good deed, or that he knew the defender to be *alibi*; by all which it would seem, the pursuer should still be present; yet this was expressly repelled, 4. August, 1652. Where *Ballindalloch*, was pursuing *John Grant*, but there it was answered, that *Ballindalloch* was one of the pursuers himself, and the remanent were his Servants.

II. Albeit the Kings Advocat be pursuer in most cases, yet he uses ordinarily to constitute a deput, who should produce a written warrand under his own hand, else cannot be admitted, and this deput can desert a dyet, though his Procuratorry do not instruct him with a particular power for that effect. 29. November 1638. Mr. *George Norvel* Procurator for Mr. *John Rollo*, which is constantly the opinion of the Doctors.

His Majesties Advocat uses not to pursue a Summonds of Treason, without a special warrand under his Majesties hand, or a particular order from the Council, which he uses to produce *ante omnia*, and is still marked by the Clerk, as may be seen in all adjournal Books, but particularly in the cases of the Lords of *Ochiltree*, and *Balmerinoch*.

His Majesties Advocat, with us examines parties, and witnesses, before the Process be intended, which he doth upon pretext

pretext, that he may thereby know how to Libel exactly, and to the end he may not vex parties, if he find no ground for the pursuit ; but many learned Lawyers, have always thought this Procedur dangerous ; for his Majesties Advocat is still a party interested, and so should not be allowed to deals with the witnesses ; for thereby he may strain from them what otherwise they would not depon. And if in our last reformation of the Justice Court, it was found that the Kings Advocat should not make the roll of Affizers, because he is too much interested, much lesse should he for the same reason, be allowed to examine the witnesses, since that is not allowed to the Advocats for the defenders.

Advocats with us in Criminals are called Proloquutors.

3. No person should plead or consult in reduction of forfeitures, without leave granted by the King, *Act 135. Fa. 6. Parl. 8.* But in other pursuits of Treason, no Advocat is obliged to crave a license, and even the foresaid act is abrogated, *Act 38. Parl. 11. Fa. 6.* Which grants only liberty to plead in all Treasons pursued before the Parliament : but by the 90. *Act. Parl. 11. Fa. 6.* Advocats are allowed before all Courts to plead, without license, and power is granted to Judges, to compel them to plead in such cases, and the former restriction has been founded upon *C. falicis de panit.* in 6, where to plead for Traitors is discharged, *nisi concedatur licentia.*

When Advocats assist Pannels, especially in Treason, they use to protest that no escape of theirs in pleading, may be misconstrued ; since what they say, is rather *ratione officii*, then *ex proprio motu*, as we see in *Balmerinochs* case ; and it were hard to be severe in such cases to Advocats, since they are accustomed to much freedom, and are oftentimes transported by the heat of opposition, and zeal to their Client, nor would men have any to engage in their defence, against such pursuits, if this liberty were not allowed, and it is against reason

not to allow it, where they are forced to plead, as they ordinarily are in cases of Treason, and yet if any Advocat will defend his own escapes against authority, he may be punished by deprivation, but his punishment extends no further, even where he speaks Treason, as was found in the Senat of Savoy, *Cod. fabr. tit. de panis defn. 19.*

By the Civil Law Procurators were admitted for the defender, where the pain to be inflicted was not corporal, for the reason why personal presence was requisite, viz. that the defender might undergo what was inflicted, did here cease, and yet with us, the defender must still be present, even where the pain to be inflicted is pecuniary, such as in cutting of green wood, stealing of Bees, &c. because the certification of the Letters with us is still to compear to underly the Law, under the pain of Rebellion, and hath not those words adjoynd, *or to show a reasonable cause*, which being added in Summonds, for Civil causes, is a sufficient warrant, for the constituting a Procurator.

Noblemen, likewise might by the Civil Law, and the opinion of the Doctors compear by their Procurators, but this is not allowed with us, Procurators might likewise by that Law, be admitted to propon the incompetency of the Judge, even in the case where there is a Statute appointing the defender to compear personally, which should much more be allowed with us, where there is no such Statute, but where this necessity is imposed by the will of the letters: *Boß, tit. an incri-*
min, num. 13. 14. Farin. de var. quest. 99. num 168. and that I have seen those who killed *Armstrong* the customer, outlawed, *July 1668*, Albeit it was alledged, they dwelt without the regality of *Annandale*, and so they should be repledged, which was repelled, because they were not present; yet the reason might be, because the Justices were Judges competent, *casu*, and the replegiation was a priviledge, with which the Lord of Regality might have dispensed, and so was competent only

only to him, and to the defender, who should have compar-
ed, *in omnem eventum.*

Procurators are also allowed to propone excuses for absents,
&c. sine mandato, si excusationes illa sunt facti, & necessaria,
as is sickness, imprisonment, *&c. Sed ad allegandum cau-
sas probabiles, & necessarias absentie,* such as the want of a
safe conduct, *requiritur mandatum; quia absens iis renuncia-
re potest, & non constat de ipsius voluntate, nisi per mandatum,*
which distinction, I think unnecessar; because it is alwayes
presumed, that the defender would willingly have himself de-
fended; and with us, a Mandat is not necessar, if an Advoca-
t be employed, for his Gown is his warrant: and where
an Advocat is employed, I think, the Cautioner may be ad-
mitted, albeit he have no warrant, *quia qui satisfacit dicitur
habere mandatum de jure farin. ibid. part. 2. num. 283.* and
the Cautioner defends himself, *eo casu,* seeing if the reason
of absence, or Effoinzie (as we call it, be found relevant, he
will not be unlauded, and where a Mandat is necessar with us,
which is, where an Advocat is not employed) it may be
doubted, if the Mandat be sufficient, if subscribed only by
one Nottar, where the party cannot write, which though
be ordinarily sustain'd, yet it would appear, that *eo casu,*
should be subscribed by two; for the Act of Parliament re-
quires two Nottars, and four Witnesses, in all cases of great
importance; yet seeing *qualibet levis probatio absentie suffi-
ficit,* it would appear, that *quodlibet mandatum hic suffi-
ficiat.*

IV. Albeit where the pursuer is a privat person, he is ob-
ligged to swear the Libel; yet where the Kings Advocat pur-
sues, he is not obligged to swear the verity of the Dittay,
because he pursues only, *ratione officii,* but I find, in the
same Decisions, that the Advocat is not obligged to depone
whether the party hath given partial counsel, the 10. of Au-
gust 1598. *Advocatus contra the Laird of Dalgety,* nor yet

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declare who is his informer, the 20. of April 1599. *Advocatus contra John Connel*, and others, but this seems unreasonable, seeing the defender should not be prejudged, by the intenting of a pursuit, at the Advocats instance; and *jure natural*, the pursuer, or informer, which is all one, should not be a Witnesse, nor can it be known who is pursuer, without the Advocat declare; it is also a great encouragement to unjust pursuits, that any person may inform at random, without being known, and the informer is liable in damage, and interest, if he inform without any ground, even though the pursuit be only raised in the name of His Majesties Advocat, *Act 78. Parl. 6. Ja. 6.* but if the Advocat may conceal lawfully the informers name, then the defender is precluded from all these just advantages. This privilege of the Advocats not swearing the Libel, seems to be founded upon the opinion of the Doctors, who contend, that *Procurator ex officio non tenetur prestare juramentum calumnia*, *Gail. obs. lib. 1. obser. 88.*

TITLE

TITLE XXI.

Of Libels, and the forms
of Proces thereto re-
lating.

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1. *A Libel is a Sylogism.*
 2. *It ought to condescend upon time, and place.*
 3. *Whether the qualities Libelled may be passed from.*
 4. *The stile of a criminal Summonds, and Inditement.*
 5. *How a criminal Summonds ought to be execute.*
 6. *Whether a person who is banished, may safely appear before the day, in the citation.*
 7. *How criminal Actions are to be called, and the forms thereto relating.*

1. **A** Libel is generally by Lawyers thought to be a Sylogism, wherein the proposition (as we call it) founded upon the Law, and though the proposition be of times generally conceived thus, that albeit by several Acts of Parliament, the crime of, &c. be expressly forbidden, &c. Yet it is more regular to expresse the particular Acts, whereupon the proposition is founded. The subsumption of the Libel, is the matter of Fact, which should condescend upon

the actors names, and designations, and upon the place where the crime was committed, either expressly, as the House of such a man, or *per coharentias*, as Lawyers speak, as that it was done near such an Hill, Water, &c.

II. That the place must be designed, is expressly required, *l. libellorum, ff. de accus.* But whether the Day, or Moneth must be exprest, is more controverted; and by the formula, exprest in the former Law, the Place and Moneth, are necessar, and to that formula, is there subjoined, thir words, *neq; diem neq; horem invitus comprehendet*, but according to the opinion of the Doctors, if the defender compear, and crave that the pursuer should expresse the Day, because he offers to prove, *alibi*, then the Judge should force the accuser to expresse the Day; for else the defender would be precluded from proving his innocence, *Bart. in l. is qui rzus, ff. de pub. Jud.* But though in that case the accuser is obliged to express, yet he is not obliged to prove the same; because the expression thereof is not necessary, for the relevancy of his Libel, but only for the clearing of the others innocence, *Bertr. and lib. 6. Consil. 61.* As also, if the pursuer can upon Oath depone, that he doth not remember the Day, and that he does not omit the same maliciously, *eo casu*, he is not obliged to express the same, *Clar. q. 12. num. 13.* But the former difficulty in this case still remains, which is, that the defender loseth the benefite of this defence, and is prejudged by his accusers ignorance, which seems to be unjust: and therefore *Cook 7. rep. Calvins case* observes, that an inditement should be most curiously, and certainly penn'd, and by the 37. *Stat. Hen. 8.* the Day, Year, and Place must be insert. By the 80. *ch. quon. attach.* these seven are to be exprest, the Names of the Parties, Day, Year, and Place, Cause of the Complaint, and Damage. According to our Law, either the crime is such, as depends upon time, as is the striking one in the Session-House, whilst the Lords sit;

or the wounding, or killing one in time of Divine Service, and in these the particular time must be both libelled, and proved; because the time is not there a meer circumstance, but it is the *medium concludendi*; and therefore a Libel in Deforcement, was not found relevant, because it condescended not upon the time, since it was lawful, if the Rebel had been apprehended upon the Sabbath, 1671, but I think that this might have been propon'd as a defence, and that the Libel without the Day, was relevant; but there also, the Year was not insert, nor would the Justices allow the filling up the same at the Barr, as in civil cases; but in other cases, where the crime depends not upon time, we use to Libel in the Moneths of *May, June, July, &c.* or one, or other of the Moneths, Weeks, or Dayes of the said Moneths, but the expressing of the Day, is not found necessary, as in the case of one *Hay*, was found the 5. of *November 1612.* and likewise upon the 8. of *July 1615.* where a dittay of theft, was found relevant, though neither condescending upon the Day, nor the marks of the Goods: And in my Lord *Argyls* case, the Parliament found it not necessary to condescend, even upon the Moneth, but the ordinary Caution allowed the defender, in that case, is, that the defender may offer to prove, that *quo ad*, some particular Dayes of these Moneths, he was *alibi*, and *quo ad* these, the Libel will not be relevant, nor he passe thereupon, to the knowledge of an inquest, but will get a precept of exculpation: as for instance, if one should be accused of killing a man, in the Moneth of *March*, upon the Street of *Edinburgh*, he might alledge, that *quo ad*, the first fourth-night he was at *London*, *quo ad*, so many other dayes thereof he was at *New-castle, &c.* And if the Witnesses, when the Libel comes to Probation, do depone, that upon any of these dayes the crime was committed, in which *alibi* is proved, the defender will not be thereupon convict; for though the pursuer needs not condescend upon the Day, yet the Witnesses must condescend upon it, in the case where *alibi* is offered

to be proved, but otherways it may be controverted whether a Libel be relevant, bearing in the general, the committing of the Crime, but not condescending upon the particular manner: as for instance, if it should be subsumed upon the A&S against fore-stalling and regrating, that the defender did fore-stal, but did not condescend upon the particular persons, from whom the corns were bought; or in usury, if the pursuer should not condescend upon the particular way how the usury was committed; and in my opinion, *regulariter*, the crimes should be particularly subsumed; becaule else the relevancy cannot be debated before the Justices, and the assize should be constantly judge of the matter of Law, and the Pannel should be put off to the knowledge of an inquest, upon irrelevant crimes, all which were absurd; but yet there are some crimes, such as fore-stalling, and regrating, in which it is sufficient to libel the Crime, without condescending upon the particulars, for in this crime it is declared by 148. *A&S, Par. 12. K. J. 6.* that a Libel bearing common regrating, or fore-stalling, in the general shall be relevant, without condescending on the time, and way of committing the same. And accordingly upon the 11. *June 1596.* A Libel against *Young* and others, for fore-stalling was found relevant, though it condescended not upon the particular persons against whom this crime was committed: And it may be debated, that a person being pursued for common usury, if that crime of common usury, may be sustained without any particular condescention, because both the relevancy, and probation is referred to his own Oath, and so he is not precluded from any defence, but since it was necessary by a particular Law in regrating, to appoint the Libel to be bound relevant upon that general, it seems to follow, that regularly the particular way, and manner must be condescended upon; else that particular dispensation had not been necessary. Whether a conclusion be necessary in Criminal Libels, is likewise debated amongst Lawyers; but the common opinion is, that it is not, because though in Civil cases, the pursuer

may crave more, or lesse, nor what is due to him, yet in Criminal, either the penalty is determined by a Law, which the Judge must follow, though it be not craved, or otherwise the pain is Arbitrary, and there the pursuer cannot by his petition determine the same, but must leave it to the Judge, *l. 1. §. quorum ff. ad S. C. turpil. l. ff. de privat delicti l. ordine ff. ad unicipalem*, and in the form set down *l. 3. ff. de accusatio*: by *Paulus*, there is no conclusion exprest, but yet with us, there is alwayes a conclusion in every Libel, though it be general, and I perceive that most of the practitioners are of opinion, that at least a general conclusion should be added.

III. Whether a Libel being libelled *qualificate*, the pursuer may passe from the quality, has been thus determined by Lawyers, that if the quality amount to another different crime, it cannot be past from, but if the quality amount only to an aggravating circumstance, it may be past from. As for instance, if the pursuer Libel upon the Act of Parliament, whereby murder under trust, is Treason, and subsume that the Pannel is guilty of murder under trust, in so far as the person murdered, was father to the murderer, if when the case is to be tryed, the pursuer should declare, that he insists against him as a Murderer simply, because he is not sure to prove, that the person killed was father: I think *eo casu*, the pursuer could not so reform or declare his Libel, for that makes the crimes to differ, the one being Murder, the other Treason, and the defender was only obliged to prepare him to defend against Treason, and finding that he was secure, as to the crime libelled, he needed not prepare other defences, or raise exculpations for that effect, but these qualities which amount only to aggravations, may be past from, as was decided, *11. November 1672.* For *Askman* having pursued *Carnegy of Newgate* for oppression, conform to the *25. Act 4. Parl. K. F. 5.* because he had beat him, who was a Magistrat, in the exercise of his Office, the Justices having found, that the pursuer

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ſuer could not in the conſtruction of Law be reputed a Magiſtrat, becauſe he had not taken the Declaration, it was thereafter alledged, that the Libel being only founded upon the foreſaid Statute conceived in favours of Magiſtrats, and the concluſion being againſt oppreſſion, and not againſt beating the purſuer, could no more inſiſt upon that Libel, which was repelled, for the Juſtices found, that the beating any man, was a crime, and the purſuer might inſiſt againſt the defender for beating him, ſince his being a Magiſtrat was only an aggravating circumſtance: Yet this ſeems a hard deciſion, ſince the propoſition of the Libel, did not bear, that beating was puniſhable, nor did the concluſion bear, that at leaſt the Panel was puniſhable for beating a free Liedge: & if this were univerſally allowed, alternative Libels were unneceſſary, and this would occaſion much looſeneſs in Criminal Libels, whereas Lawyers treating of Criminal Libels, have laid it down as a principle, that *in criminalibus non licet vagare*, and the crimes of oppreſſion, and beating, are different. Nor can it be denied, that a privat perſon differs from a Magiſtrat, ſo that this equality made the perſons, the crimes, and the *medium concluendi* to differ,

IV. For the better clearing of our cuſtom in theſe caſes, I have ſet down the form both of the Criminal Letters, and Criminal Indictment now in uſe with us,

A Criminal Summons.

CHARLES, &c. humbly mean'd and complain'd to Us, by Our Lovits, A. the relict, B. ſiſter, daughter, and neareſt kinf-woman, C. as Mr. with the remanent kin of Umquhile Main, ervant to the ſaid C. and Our right truſty and well beloved Councellor, our Advocat, for our intereſt in the matter ſubſcribed upon Liſtoun, without any juſt cauſe, offence or injury done to him, by the ſaid umquhile Main, having conceived a deadly

deadly hatred, and evil will against him, with an settled purpose, and resolution to bereave him of his life, one way, or another, lately, upon the last day of _____ where the said Main was in quiet, and sober manner for the time, expecting no harme, injury nor pursuite of any person, but to have lived under Gods peace, and ours. And the said Listoun being bodden with a great Batton, or rung in his hand, and with knives and other invasive weapons, first upbraided the said Main with words, alledging that he was a common Thief, and had stolen, &c. And thereafter, because the said Main had purged himself of that calumny, and said he was as honest a man as himself, he thereupon ran and rushed the said Main (being an aged man of 74. years of age) to the ground under his feet, struck him in the head, craig, shoulders, and side, with the said Batton, lap upon his breast and belly with his feet and knees, beat him upon the heart, and thereby broke, and bruised his whole intrals, and noble parts, thereafter healed and drew him by the heels, off the saids lands, by the space of a quarter of a mile, to a low Vault in, &c. and imprisoned him therein, tanquam in privato carcere, he being in the dead thraw: Likeas, within three hours after his imprisoning in the said Vault, the poor aged man dyed of the saids stoaks and hurts; likeas, to suppress the Murder, the said Listoun with his complices, buried him in an obscure place in the night time, and swa the said Main was shamefully, and cruelly murdered, and slain, and secretly buried by the said Listoun, and his complices, and he is Art and Part thereof, committed upon set purpose, and provision, and forethought Felony, in high and manifest contempt of our Authority and Laws, in evil example of others to commit the like; if swa be, OUR WILL IS herefore, &c. and in Our name and authority, command and charge, the said Listoun, committer of the said Barbarous murder, in manner foresaid, to come and find sufficient Caution, Surety to Our Justice Clerk, and his deputs, acted in our books of Adjournal, that he shall compear before the Justice, or his deputs, to underlye the Law for the samen in our Tolbwith

calbuith in Edinburgh, on the Day of in the hour of
 cause, under the pain contained in Our Acts of Parliament, and
 that ye charge him personally, if that he can be apprehended, and
 seizing thereof, at his dwelling house, and by open proclamation,
 at the Mercat Crosse of the head Burgh of the Shyre, Stewar-
 ry, or Regality where he dwels, to come and find the said soverty
 charged, in manner foresaid, with in six dayes next after he bees
 charged he yon thereto, under the pain of Rebellion, and putting
 him to the Horn, the whilk six dayes being by past, and the su-
 m being not being found, that ye immediatly thereafter denounce him
 rebel, and put him to our Horn, and escheat and inbring all his
 moveable goods, to our use, for his contempt, and cause Regi-
 strathir our Letters, with the executions thereof, in the books of
 adjournal, within fifteen dayes thereafter, conform to our Act
 of Parliament made thereanent, and if he find the said soverty,
 mitigation being alwayes made by you, to us, of the finding
 thereof, that ye Summond an assize hereto, not exceeding the
 number of 45. persons, together with sick witnesses as best knows
 the verity of the premisses, whose names ye shall receive in the
 rolls, subscribed by the complainers, or either of them, ilk per-
 son under the pain of a 100. Merks, as ye will answer to us
 in deliberatione.

The form of an Inditement is thus.

An Inditement.

For sameikle as the abominable, vile, and filthy vice of In-
 cest, being so odious, and detestable in the presence of Al-
 mighty God, and be the same eternal God; his express word so
 early condemned; Therefore our sovereign Lord, out of his
 holy disposition, and zeal, by diverse his Acts of Parliament,
 pressy Statute, and ordained, that whatsoever person, or per-
 sons

sons, commits the said abominable crime of Incest, shall be punished to the death, as the saids Acts of Parliament, in themselves proports: Notwithstanding, it is of verity, that the said A.B. being married with his lawful Spouse, Daughter to C, most shamefully, but fear of God, or respect to our Sovereign Lords Laws, has given the use of his Body to D. His Wifes Sister in the Moneths of _____ in his and her journeying, betwixt the Burgh of Edinburgh, and the Town of Elgin, and within the said Town of Elgin, in the which filthy, and incestuous copulation, she has procreat a Bairn, committing there-through the said filthy crime of Incest, and Adultery, to the high offence and displeasure of Almighty God, violation of the Kings Majestie's Laws, and evil example of others, to run in the like filthy and abominable vice, if the samine be suffered to remain unpunished, as at length is contained in the said Dittay, produced against him, &c.

V. The Summonds should be execute only by a Messenger at Arms, or by an Officer of the Court, except in the case of Treason; in which case, it is appointed by the 125. *Act Parl. 12. K. 74. 6.* that Letters, and Summonds of Treason, should be execute only by Heraulds, and Purservants bearing Coats of Arms, or by Macers, which must be understood only of Macers of the criminal Court; for the Macers of the Council, or Exchequer, or Session, cannot execute any other Summonds, but what is pursued before these Respective Courts, to which they are Macers. The form of the Execution, is, that there be a full Coppy of the Letters delivered to the defender, if he be personally apprehended, or if he cannot be personally apprehended, to his Wife, or Servants, or affix upon the Gate of his dwelling House, if he any has, and Proclamation at the head Burgh of the Shire, where a Coppy is likewise to be fixed at the Mercat Cross; but if there be more persons then two, and all be called for one deed, and

crime

crime; in that caſe, two of the Copies are to be delivered, to two of the Principals, named in the ſaid Letters, or their Wives, &c. In manner foreſaid, is ſufficient, *Q. M. 6. P. cap. 33.* but if the Perſons live in Shires, or Countreys, *ubi non patet tutus acceſſus*, the Bill whereupon the Letters paſſe, uſe to contain a priviledge, for citing them at the head Burgh of the Shire, and to the end of the Letters, bearing thir words, *and failzing thereof, by open Proclamation, at the Mercat Croſſes of our Burghs of, &c.* becauſe they are broken men, having no certain dwelling, and haunts, and frequentſ with other broken men, where our Officers dare not reſort, for fear of their lives, with the whilk Charge; ſwa to be given, We, and the Lords of Our Council, by thir Preſents diſpenſes, and admits the ſamine to be as lawful, and ſufficient, as if ilk an of them were perſonally apprehended, this is by the Doctors called, *citatio edictalis*, but if the party be out of the Countrey, he muſt be cited at the Mercat Croſs of *Edinburgh*, Peir and Shoar of *Leith*, as in other caſes. *Nota*, though the Act of Parliament foreſaid, bear not a full Copy, yet it is abſolutely neceſſar, that a full Copy be given; for the Dyets in the Criminal Court being peremptor, the Summonds is not given up to ſee, as in other Courts; and therefore the defender ſhould have a full Copy, that he may come inſtructed how to defend, and that he may timeouſly raiſe exculpation; and if a full Copy be not given, the Executions have been found null, *intotum*, and the Acts of Parliament appoints they ſhould be null, *Anno 1665. Livingſtoun contra Leith*: And though ſome think, that in the caſe where a ſhort Copy is given, the Summonds ſhould be only given up to a ſhort day; but the Execution ſhould not be null: yet I think that opinion is not found. 1. Becauſe the Act of Parliament appoints the Execution to be null, where a Copy is not given. 2. The giving up to ſee, cannot be ſufficient, for if the party had gotten a full

Coppy at home, upon the place where he lives, he had raised Exculpation, and cited the Witnesses therefore upon the place. Thir Executions should be subscribed by the Executioner, and stamped, and Sealed before Witnesses, else they are null, *Act 32. Parl. 5. F. 3.* And Letters should not be directed generally, against Complices, but the particular crimes of every defender should be expressed, *Fa. 6. Parl. 6. cap. 76.* and *Fa. 6. Parl. 11. cap. 85.* And by this last Act, all Criminal Letters, which import tinsel of Life, and Moveable Goods, when they are execute by open Proclamation, at Mercat Crosses, should be execute betwixt eight Hours of the Morning, and twelve Hours at Noon: Though formerly, when a party was in Prison, his Inditement might have been given him upon twenty four Hours; yet it was found in the case of *Robertson*, in *July 1673.* that a Pannel in Prison, should have fifteen Dayes at least, that he might within that time, either raise a Summonds of Exculpation, or might take out diligences, for proving his Objections against Witnesses, or Affizes, and that conform to the eleventh Article of the Regulations, concerning the Justice Court, though it was alledged then, by His *Majesties* Advocat, that there was no expresse Warrant for that Indulgence, in that Article. And Correctory Laws, such as the Regulations were, ought not to be extended beyond the Letter; especially in this case where the Pannel was a Murderer, taken with reid hand, and Justice was to be done against such, by our old Law, within twenty four Houres: which replies were repelled, in respect it was duplyed for the Pannel, that though the Law did not expresse the time that is to be indulged, to such as are criminally pursued, yet it having exprest the reason, for which this indulgence is to be given, *viz.* that the party might either exculpat himself, or cast the Witnesses, or Affizers that were to be used against him, the Law could not but allow a time sufficient for doing that diligence, it being a Rule of Law

Law, and a Principle in Reason, that *quando aliquid conceditur, omnia concessa videntur sine quibus hoc fieri nequit*, and though where a party is taken reid hand, and confesses, the Judge ought to do present Justice upon him; yet that is only introduced to make Judges diligent, but not at all to preclude poor Pannels from their just defences, and it were a thing very inhumane, and unwarrantable, if a poor Pannel were taken reid hand, but could prove that he was forced to kill in self-defence; or if he could prove, that one of the Witnesses had been one of the Aggressors; that in either of these, or such like cases, he could not have time to cite Witnesses for that effect.

VI. Whether a person who is cited to compare in a criminal Court, as defender, at a particular day express in the Summons, may not before that day appear in *Edinburgh*, though he be banisht, was doubted, in the Action pursued at His Majesties instance, against several Gentle-men, in *Anno 1674*. and that they might come to *Edinburgh*, was allowed; because being cited, they were commanded to come. 2. Their coming to Town was necessary, in order to their defence, and thus, when men are indited, they have the liberty of a free Prison, though till then they were ordered to be kept in close Prison; and yet some thought that this might be doubted, since they were once formally banisht; and to the banishment should be formally taken off, and the raising of a dittay is no discharge of the banishment, for else the Kings Advocate might discharge banishments when he pleased, and indite-ments bear not to appear betwixt and such a day, but at such a day. 2. When men are under Caption, they may be taken, if they appear before the day of comparance, if they have not a Protection, which shews, that a meer citation doth not take off the dangers, to which the person cited is liable. 3. Protections were needless, if this were allowed, for the ci-

tation would be a Protection, and yet Protections are ordained to be granted to defenders in such cases.

As also it was doubted there, if such as were cited upon sixty days, might compear with others of their complices, who were cited upon six dayes, for it was urg'd, that the appearing upon sixty dayes, was introduced in the defenders favours, and so he might renounce it, and possibly he cannot compear at the long Dyet; and yet it may be urged, that the pursuer has chosen his own Dyet, and it may be his true interest sometimes to divide the defenders, and sometimes his Probation cannot be sooner ready.

When there are more pursuers, each Libelling a distinct interest, as three brothers pursuing for the murder of their deceased brothers, though they were all three killed at the same time, and in the same action. It has been found, that two of the pursuers being absent, the third could not insist: and so the diet was deserted, upon pretext that the Libel was complex, but I conceive, that the interests there were very distinct, though in the same Libel, and that though they had been all joint pursuers, yet the absence of the rest should not prejudice any one, who has a sufficient interest, *per se*.

VII. When the day of compearance comes, which is peremptor, and not with continuation of dayes, by the Act 7. 6. the Justice-clerk calls the Summonds, and if the pursuer be present, and the defender be absent, he is declared Fugitive, and his Cautioner is outlawed, but if the pursuer be not present, then the Clerk calls upon the Act, for reporting the Criminal Letters, and the Cautioner is outlawed, for not reporting the Criminal Letters: And in either cases an Act is extracted; and if both pursuer, and defender be absent, the pursuers Cautioner is outlawed, for not reporting the Criminal Letters, and the defender is outlawed, and his Cautioner is likewise outlawed for not presenting him; but if either, or both compear, the Cautioners takes Instruments upon their

reporting the Letters. If the defenders Cautioner present him at the day, but if the Judge be absent, or the day feriat, as it be a publick Fast, then I think the Cautioner is not free; but he should present him at a day wherein he may be pursued, for his obligation must be interpreted to be, *cum effectu*, especially if the Pannel would have been imprisoned, if he had not found that person Cautioner.

Upon their presenting the Pannel, then the defender enters upon Pannel, and the Clerk marks, *curia affirmata die mensis per* and marks such a man entered upon the Pannel, such a day accused for the crime, &c. and marks who were pursuers, and who were Proloquutors in defence, and the Dittay is read, and the Justices ask whether the Pannel be guilty, or not; which is conform to *l. 3. ff. quam anis non possint, & l. & adulteram ff. ad leg. jul. de adult.* and the Advocats for the defender, dictat both the Dilator, and peremptor defences, as the Advocats for the pursuer, do his replies and triplys, which has been originally introduced amongst us, as I conjecture that the Judges might not be seduc'd, by the passionat, and well acted Eloquence of Advocats, *Quintil. Athenis* (speaking of the *Areopage*) *affectus movere etiam per praconem prohibebatur orator*, ἀφαινεῖται τὸ πρῶτον ὁρῶντες. By dictating also, the Advocat considers more gravely what he asserts in these cases, which are of so great concern, and the Judge has more permanently under his consideration what he is to do, and succeeding ages may better judge of the grounds whereupon he proceeded

TITLE

TITLE XXII.

Of Exculpation, and the other privileges competent to the defender.

1. *The rise and progress of exculpations with us.*
2. *Whether exculpations may be admitted, though contrair to the Libel.*
3. *How alibi should exculpat.*
4. *Witnesses liable to exceptions may be admitted in exculpations.*
5. *Witnesses for exculpating may be admitted, though not cited.*
6. *Whether a man may be punished, though he has not fully proved his exculpation.*
7. *How the defender may exculpat if the pursuer insist not.*
8. *Whether the Justices, or Assessors are judges to exculpations.*
9. *What if the pursuer cite as parties, the defenders necessary witnesses?*

Albeit after a crime is proved, the Pannel is most unfavourable, yet till then, he is still presumed innocent, & *præstat nocentem absolvere, quam innocentem condemnare,* &

Petr.

Petr. de Anach. consil. 23. observes well, that the Court deserves much more honour, when they absolve, then when they condemn. The reason of which is, because when an innocent person is condemned, the wrong cannot be repaired, but when a guilty person is absolved, yet God will either suffer him to fall in a second snare, whereby the first crime may be also punished, or at least, his infinite Justice will punish him eternally if he repent not.

When any person was Criminally pursued, he had by the common Law the benefite of exculpation, for so they term the defences of the Pannel, as is clear by *Clar. quest.* 51. But I find not this term used with us, till the Year. 1661. at which time, it was used first in *Argyles* proceffe. The *English* call this, to traverse an Inditement, from the *French* word *traverser* (as I suppose) which signifies to oppose, or cross.

When a Pannel before that time, was pursued in *Scotland*, he behoved presently to propon his defences, and have witnesses there present, for proving it, or else he behoved to refer it to the pursuers witnesses, for our Ancestors thought that the pursuers Witnesses being present, could not but know all the matter of fact exactly, and so were as fit to prove the exculpation, as the Libel; but this was a mistake; for witnesses might have been present when the wound was given, who were not present at the beginning, when the occasion of the wound was given, whereupon the exculpation of self-defence was founded; so that other witnesses are oftentimes necessary, beside these adduced by the pursuer, and it is not safe to presume, that these will come without a citation, or if they come without a citation, they are *ultronie*, and so are suspect.

In anno. 1661. the Justices did begin to grant precepts of Exculpation, which were drawn by the Clerk, and express, that in respect there was a pursuit of such a nature, intended against such a man, and that he had defences to propon (here the defences were express) therefore the Justices granted warrant to him, to cite witnesses for proving thereof, &c. That

This precept was subscribed only by one of the Justices, yet thereafter in *anno 1666*, the justices ordained, that a formal Summons, past under the signet of the Session should be granted for citing witnesses for Exculpation, and they are called now Letters of Exculpation, which contain the defence, as formerly the precepts did, but because the Lords of Session use to scruple, to passe such Bills; therefore the Justices first consider the defence, and if they find it probable, they use to subscribe the warrant for a Bill, which Bill is past by one of the Justices amongst the common Bills, and that Bill is the warrant of the Letters.

When the Pannel is accused, and the Libel read, his Advocate doth propon the defence, or exculpation, v. g. if the Libel be Murder, the defence is *inculcata tutela*, &c. and after the defence is debated, and either admitted, or repelled, by an expresse signator of processe, then the witnesses are accordingly admitted.

If the Justices refuse to passe a warrant for Letters of exculpation, the defender ought not to be thereby prejudged, but the dyet will be continued, till Letters of Exculpation be raised, as was found in my Lord *Rentouns* case, against the Laird of *Wedderburn*, December, 1669. And though the summons of Exculpation should be execute to the same dyet with the Principal Summons, yet if the Justices find it reasonable, they may continue the dyet, and allow a competent time for raising Exculpation, as they did 13. July, 1676. In a case pursued by *Mackintosh*, against *Grant*, for in remote Shires, the defender has not time to raise and execute Exculpations to the day of comparance in the principal cause.

The ordinary defences are to be seen in the respective Titles to which they relate, and it would swell too much, and too unnecessarily this Title to repeat them here.

II. It is ordinarily replied to defences of Exculpation, that they

they are contrary to the pursuers Libel, and so ought not to be admitted to probation, and thus *Mr. William Sumervel* being pursued, for murdering of *Bessy Rentown*, it was alledged, that it was offered to be proved, that the wound was not mortal, as appeared clearly to many who saw the same immediatly after it was given, Likeas she went that night to her brothers house, three miles on foot, and never took bed, but wrought as a servant in her ordinary imployments, for twelve weeks, And at last having gone to attend her brother, who dyed of a spotted Fever, she was by him infected, and dyed of a Fever, which defence of Exculpation was repelled. *Decemb. 1669.* as contrary to the Libel, wherein it was expressly Libelled, that he gave her a mortal wound, that she died of the wound that he gave her, and I find it formerly repelled. *15. July, 1642.* *Cheyn* against *Mowit*, But this principle, viz. that exculpation directly opposit to the Libel, should not be admitted, seems not to be allowable, for all defences of Exculpation might be thereby precluded, for the pursuer might so circumstantiat his Libel, upon design, as that the only exculpation which he feared, behoved to be contrary to his Libel, and since in *Scotland* the pursuer is not precisely obliged to prove all the qualities which he Libels, but it is sufficient that he prove the Libel it self, the poor defender might easily be cheated; for the pursuer might Libel all the circumstances exclusive of the exculpation, which he feared, and after he had thereby excluded the defence, he might contend, that albeit the qualities were not proved; yet the fact it self being proved it was sufficient. 2. In Civil cases, some defences are admitted, though contrary to the Libel, as in Ryots before the Council, and in Spuilzies; and therefore they ought much more to be admitted, in Criminal cases, wherein the defender is more favourable, then he is in civil cases. 3. If this principle did generally hold, then self-defence, and casual homicide could never be allowed as Exculpations, for both these are di-

rectly contrary to the Libel, used in the case of *Homicide*; which bears still premeditation, and fore-thought-telony. But to reconcile these differences, that which I find more suitable to reason, in these indigested discourses, which the Doctors make upon this Subject, may be comprehended under these conclusions, 1. Where the defence is not absolutely contrary to the Libel, it ought only to be admitted to probation. 2. Though it be contrary to the Libel, yet according to the Doctors, a conjunct probation should be granted, for besides the former reasons, I find the *Civilians* debate very learnedly, whether when the pursuers probation of the Libel, is expressly contrary to the probation led by the defender, the pursuers, or defenders probation ought to be preferred, *Bossius tit. defens. reor*: which question were needless, if a mutual probation were not allowed, *eo casu*, and *Boss.* there advises the defender, *capitulare directe contrarium ejus quod libellatur*, and when the probations differ, the ordinary rules to be followed are, that 1. The defenders probation is to be preferred, *Gloss. in cap. in nostris detest*; because it is admitted by the presumption, that *nemo presumitur diliquisse*, *Boss. ibid.* But if the probation be not equal, the greater number, or these who depon what is most probable, or the worthiest persons ought to be believed, *Boss. ibid.*

How far this Doctrine is allowed by our practice, will appear, from a case decided in *Jun 1670*. In which, *William Mackie*, being pursued for killing *Hoom*, in a single Combat, did alledge, that if he did kill him, it was in his own defence; in so far as *Hoom* fell upon him, with a drawn Sword. To which it was replied, that self-defence could not be receivable; because it was expressly Libelled, that there past a mutual provocation: and though he went to the Park without his Sword, yet having been thereafter provoked, and fighting, and killing the Defunct, he cannot be said

to have done this, *se defendendo*, else the Act of Parliament against Duels, might be easily eluded; and though, if the Libells did only bear fore-thought-fellony in general, self-defence might be receiveable to eleid the Libel; yet where the Libel was founded upon a special qualification of provocation, self-defence was never sustained, to eleid the Libel, and the reason of the defence, is, because in the first case, self-defence is not contrary, *substantia libelli*; but only eleids it in a quality, which is presumed, and to needs not be proved, *viz.* forethought-fellony, whereas, in this case, if self-defence were receiveable, to eleid a Libel, founded upon provocation, and Duelling, it would be expressly contrary to the Libel, and to the quality of provocation, which is a quality that must be proved. In respect of which reply, the self-defence was repell'd

III. But since defences expressly contrary to the Libel, cannot be sustain'd in our Law; it may be doubted, if the exception of *alibi*, be relevant: for since the Libel bears, that the Pannel was actor there, it is contrary to the Libel to alledge, that the Pannel was else where, than where the crime was committed; for that is the same thing, as to alledge, and offer to prove that he kill'd not there. But I think in this case, *alibi* should be strongly qualified, and if it be, then both the Libel, and defence ought to be admitted to probation; but so that if the Judge find *alibi*, not to be clearly proved, then only he should allow the pursuer to prove his Libel, for to admit contrary Probations, were to open a Door to Perjury, and not to allow the pursuer to prove also, were to infer a crime without Probation; for the Pannels not proving his defence, doth not, *in criminalibus*, relieve the accuser from the necessity of proving his Libel, as it doth in civil cases. And this seems to be our Law, and more just and Christian, then-conjunct Probations are.

IV. According to the opinion of the Doctors, Exculpation

on is so favourable, that many who could not be received as Witnesses to prove the Libel, would be admitted to prove the defence, as a Brother, or a Domestick, *Fason. in leg. ut. vim. ff. de just. & jur. & Clar.*

And *Bocerus, de duell. cap. 8. num. 82.* gives it for a rule, that *probandur articuli pro inculcata tutela testibus alias minus idoneis ut frater pro fratre affinis pro affine, &c.* *Idem asserunt Mascard vol. 1. conclus. 490. Gail. de pac. publ. cap. 16.* For though it would seem that the presumption lies still against the killer, and so he should be burthen'd with the stronger Probation, yet it may be answered, that that rule holds only against the accuser, but not against the defender; as also, it may be answered, that he who killed in his own defence, was not doing what was unlawful, but what was lawful and necessary; and therefore the Law should presume in his favours, and not against him. And in *Rutherfoords Process*, in *January 1664.* it was found, that Women might be admitted to prove self-defence, if there were Women upon the place.

V. It is very ordinary for some Judges, not to admit Witnesses to exculpat, except they be cited, and all the formalities be observed, in their citations, that are observed in other citations; But I should rather think with the *Civilians*, that as *testes in defensam*, are admitted, though they be not *habiles*, so Witnesses may be admitted, though not cited, for this was our ancient practice, and the benefit of Exculpation, is mainly brought in to favour the defender: And is it not strange, that if a man were Pannell'd for Murder, and saw two persons present, who knew that what he did, was done in his own defence, it should not be lawful to him, to desire them to be examined; this were to profer meer formalities, to real truth: And whereas, it is observed, that these *testes*, are *ultonei*, who came without being cited, and so ought not to be received. To this it is answered, that all such as come without being cited, are not *testes ultronei*, but only such

such as offer themselves without being required, by Judge, or Party, as if a man should step out, and desire to be examined: And whereas, it is urg'd, that they must be presumed partial, who come there meerly to be examined, and this is the same thing, as if they offered themselves; it is answered, that the presumption is very groundless, for they might have come there without any such designs; and if they had such a design, they might safely have eluded the formality objected, by causing cite them. Others use a strange evasion in this case, for though they confess that Witnesses may be examined in Exculpations, though not cited; yet if a Summons be once raised, they conceive that none should be allowed to depon, but such as are cited; because, say they, the defender can only in that case blame himself, who used not the remedy, that was competent to him. 2. If the contrary were allowed, there needed no Summons of Exculpation be raised. 3. It is presumeable, that the defender hath, *ex post facto*, corrupted that Witness; for if he had been able truly to depon any thing, he would have cited him at the beginning. Notwithstanding of all which, I humbly conceive, that even though no Summons of Exculpation have been raised, it is lawful to examine such as are not cited, for the same arguments urge for their examination, that were urg'd for examining such as were not cited, where there is no summons raised. And as to the contrary arguments, it is answered, that as to the first, there may be cases wherein the defender is not to blame; as for instance, if he knew not the names of such as were present, when he was forced to kill; that he could not cite them, but yet he knew their Faces, and so was forc'd to call them out, to be examined when he saw them in a Justice Court. As also, knowing that citations were introduced in his own favours, and to compel them to appear, he might have omitted the citation, or possibly knew not where they were to be found, or wanted Money to cite

cite them; and this answers likewise the third argument. To the second, it is answered, that Summonds of Exculpation, will be likewise very necessary in other cases, as if the Witnesses be unwilling to compear, or design to go abroad, &c. And whereas it is pretended, that if a citation had been given, the pursuer would have gotten the names of the Witnesses, who were to be used in the Exculpation, and so might have been ready to object against them. To this it was answered, that if this argument proves any thing, it would prove that no Witnesses could be received in Exculpations, except they were cited, which were absurd; and the reason why Witnesses names were ordained to be given with the Libel, was introduced in favours of the defender, and that he might not rely upon Depositions of suspect Witnesses; and so it were unjust to detort this to the defenders prejudice. Nor is there such hazard of corruption in Exculpations, as in pursutes, for no man is to die, no Estate to be foreteited, nor no mans Fame to be tainted by the Depositions, of exculpating Witnesses.

But I find no such speciality in our Law, nor is that privilege ledge reasonable, for men are prone, though they have no relation, to depone in favours, rather of the Pannel, then of the accuser; and therefore it is, that our Law allows an Allowance of errour against such as absolve, but not against such as condemn.

V I. The Doctors also allow Exculpation to be proved, per *conjecturas, & judicia, l. merito. ff. pro. socio Bos. tit. de favor. de sens.* but this is likewise reprobated by our Law, and if it were allowed, punishments should be absolutely arbitrary. But it is questioned what punishment should be inflicted upon the defender, who hath proved his defence, but not fully: as if he prove by one Witness, that the murder was committed in defence, &c. For resolution of which doubt, they distinguish, whether the imperfect Probation

the defence, be Diametrically contrary to the pursuers Probation, and in that case they think it ought not to be respected, both because it is in it self imperfect, and because it is contrary to a concluding Probation: but if it be not fully contrary, but tending only to prove somewhat that is different from the Libel, as if the pursuer prove wholly the murder, and the defender that it was done in self-defence, then they think that the Probation, though not full, doth obtuscar, and weaken the pursuers Probation; and consequently the defender ought not to be punished with death, which punishment ought only to be infered, *per probationem omni exceptione majorem*, Bart. in l. *Admonendi* ff. *de jur Anchar. concil.* 285. And I think, that albeit the Assize behov'd to file, *eo casu*, yet the Council ought upon a favourable representation from the Justices, to remit somewhat of the ordinary punishment.

VII. If the pursuer insist not, so that the defenders Probation of self-defence may perish in the interim, or if he who may accuse, will raise no accusation, then the person to whom the Exculpation would be competent, may intend a Summons, wherein he must cite the party injured, or his relations, and His Majesties Advocat, and in it he may conclude, that the depositions of the Witnesses, *ad defensionem*, may be taken to ly, *in retentis, ad futuram rei memoriam*.

VIII. When Witnesses are led, they should presently depone, and the Justices should be Judges to what they depone, and it ought not to be remitted to the Assizes, because, *non constat*, till the probation be led, whether the Exculpation be exclusive of the Libel, or eleids it; and so the Libel cannot go to the knowledge of an Inquest, as was found after much debate in *Barcleys* case, but this (in my opinion) should only hold where the defence is exclusive of the Libel, but where both the Libel, and Defence are admitted jointly

to Probation, I think that both should be referred to the Inquiry; because the Probation must be jointly considered, and the Justices cannot be Judges competent to the Probation of the Libel, and so not to that which is joyned inseparably with it.

If the defender propon a defence, but prove it not, it is doubted, if by proponing the defence, he acknowledges the Libel? The reason of the doubt, upon the one hand is, that in all civil Processes, he who propones a defence, acknowledges the Libel, and in reason it appears that this should hold in criminals; for he who alledges that he murdered a man in self-defence, doth acknowledge that he killed him: but upon the other hand it seems hard, that if the defender prove not his defence, that he should therefore dy: seeing that were to condemn the Pannel, *per judicia*, and without Probation upon a meer formality, & *ante quam constat de corpore delicti*, neither is the pursuer prejudged by the Pannels not proving his defence; seeing his Witnesses must still be present at the same time, whereas in civil cases that danger is not so great, and the pursuer is prejudged; for he is not obliged to have Witnesses ready for proving his Libel. To which last I incline, *vid. tit.* Confession where I have debated, how far a qualified confession ought to operat.

IX. It is ordinary for the violent pursuers of crimes, to cite as Complices, all such as may be led as Witnesses by the Pannel, for proving his Exculpation, or other Defences, upon design to decline, or set them from being Witnesses, when they are led; for one Pannel cannot be led by another, as Witness for him. And yet upon the other hand, if this were allowed as a sufficient exception, it should still be in the pursuers power to cut the Pannel off from proveing even his just defences. To reconcile which, I remember that the Lord of Session in a spoulzie, pursued before them, the 24. of February 1662. at the instance of Mackertney, against Irwing

dain'd these Witnesses, against whom the exception was propon'd, to be first insisted against; to the end if they were found innocent, they might be allowed as Witnesses against the other Pannel, if not, they might be declin'd. Which Method was very just before them, but seems more difficult in Criminal Courts, where diets are peremptor, and where Courts cannot be continued: but to this difficulty it may be answered, that though Courts cannot be continued by the Justices, *regulariter*, as in civil cases; yet in many cases, incidents may occur, whereby continuations are necessary, and all Laws must yeild to necessity.

The exception of self-defence is treated, Title Murder. And it is fit to observe that in the *Areopage*, if the Pannel confest he committed murder, but that he killed lawfully, he was not try'd, *εν δολφτω*, where murder was try'd, but *ηπαλλαδιω*, *Perion. de magistr. athen. cap. 25.*

R R

TITLE

T I T L E XXII.

Of Assize.

1. *The origine of Assises and Inquests.*
2. *The form of citing Assissers, and who makes the Roll.*
3. *Sometimes there needs no Assise.*
4. *What is proper to be tried by the Judge, and what by the Inquest.*
5. *The difference betwixt an ordinary, and a great Assise, and the number of Assizers in both.*
6. *The Oath of Assizers, and the objections by which they may be declined.*
7. *Every man must be judged by his Peers, and who these are?*
8. *Whether Assizers may judge upon proper knowledge.*
9. *All Probations should be led in presence of the Assizers.*
10. *The Assize after inclosure can speak to no man.*
11. *How the Assize ought to proceed after they are inclosed.*
12. *Wilful error in Assizers, how punished: and by whom.*

I. **A**LL judgements were at first pronounced by neighbours, and thus amongst the Romans, were *centum viralia iudicia*, and amongst the Feudalists, *pares curie*, were

were only Judges, in place of which last, came our Assizes in France, England, and Scotland, they are called a *condign inquest*; because these should be, *pares curie. & ita condigni.*

The Word *Assize* is originally French, and signifies properly sitting, or Session, *les assises sont les grands jours plaids solennels*, Roy Charles, Anno. 1413. *vid. judicem Regem verb. assise*, where it will appear, that Assize in French, signifies a Judicator; and in our Law it is often taken for a constitution, or Statute which is made by that Session, or sitting of the Judges, and thus the Statutes of King David, are called *assisa regis Davidis*, and *assisa terra*, is called the Law of the Land; *Assisa* is likewise sometimes called a measure, and thus it is said, *Fa. 3. Pa. 14. cap. 110.* that the Barrel should contain the Assize, and measure of 14. gallons, and the *assisa halcum*, or assize of Herring, signifies a certain quantity, and measure of Herring, which pertains to the King, as a part of his Customes, *Fa. 6. Pa. 15. cap. 237.* And in the French Law, it signifies a Tax also, *Regem ibid.* But the proper acceptation of the Word Assize, as it is now determined by custom, is to signify those who are chosen by our Law to determine, either in civil, or criminal cases, the matter of Probation, and are in effect neither properly Judges, nor Witnesses, but both.

II. For the more exact clearing of the Office of Assizers in criminal cases, the Reader may take notice, that the Libel alwayes bears, that the pursuer shall Summond an Assize, not exceeding fourty five persons, which shall be given up in a Roll to the Messenger, and should be subscribed by the pursuer, which Roll shall be annexed to the end of his execution, *Fa. 6. Pa. 6. cap. 16.* But albeit this Act appoints, that the Roll shall be subscribed by the pursuer; yet it is sustained as valid, though not subscribed by him, if he homologat, and ratifie the execution given in by the Messenger, albeit it may

be alledged, that the Summonding of Assizes, is, *eo casu* not lawful, seing it wants a warrand; this subscribed list being by the foresaid Act of Parliament, and Summonds it self appointed to be the warrand: as also, albeit by the Act, the Messenger is prohibit to cite any more then fourty five, under the pain of five hundred Merks, yet the execution is not *eo casu*, declared thereby to be unlawful, and by that Act it is likewise declared that upon supplication, the Lords may allow more persons to be cited then fourty five,

Why the pursuer should have had the choice of the Inquest, may be doubted. And if Assizers may judge, *ex propria scientia*, it would appear, that to allow the pursuer the choice of the Assize, were to put the defender absolutely in his will: And I find that *Gail. l. 2. obs. 34.* concludes, that the custom of some places allowing, *domino electionem parium* (*patres apud nos*, signifies Assizers) is most unreasonable, *quia dominus ita, est quodam modo iudex in propria causa; nam est procul dubio eos electurus, per quos se victoria potiturum sperat* *Alvarot. ad cap. 1. de contrav. fend.* To which difficulty it may be answered, in defence of our Law, and Practique, that 1. Where the Advocat is pursuer, it is presumeable, that he will be most just, and that he will proceed without interest, or malice. 2. These Assizers are in effect, either Judges, or Witnesses, and the pursuer hath still the choice, of both Judges, and Witnesses, if they be otherwise competent. 3. As the defender may decline them, if there be any reason for it, so they are sworn; nor is it presumeable, that any will be so impious, to condemn a man to dy, to please others: Upon which presumption, our Law leans so much, that though Assizers condemn unjustly, they are not liable to an Assize of error, as is believed. But by the third Article of the Regulation, 1670. the list of the Assizers, is to be made by a Quorum of the Justices, and that list should

express, not only the names, but the designation of the Assizers.

When the day of compearance is come, and the Letters are called, and the Assizers are likewise called, and each absent Assizer is for his absence fin'd in an hundred Merks, and their unlaues are to be taken up without any composition, *Fa. 6. Par. 12. cap. 126.* by which act it is likewise appointed, that an act is to be extracted upon their said absence, and is to be delivered to the swearer, or his Clerk, within six dayes thereafter, that Letters may be direct therupon, for taking their unlaues, but the pain of ilk absent Assizer at a Justice Air, is to be fourty Pounds, *Fa. 6. Par. 11. cap. 81.* If the Assizers Summond be not present, others may be Summoned at the Bar, or *apud alia*, as we call it, *Fa. 4. Par. 6. cap. 94.* When the Assizers are called, fifteen of them are marked, and then the ditray is read; for the debate upon the relevancy must be in presence of the Assize, *Fa. 6. Par. 1. cap. 90.* seeing albeit they be not Judges to the relevancy; yet since they are Judges to the Probation, which depends much upon the relevancy; and seeing the Justices remit several defences, which are propon'd against the relevancy to the Inquest, it is most reasonable they should hear the debate.

III. The defence against the relevancy begins thus: it is alledged by *A. C.* as Procurator for the Pannel, that the Pannel should not go to the knowledge of an Inquest; because &c. And after all the defences are discust, the words of the Interloquutor bear, that the Justices either sustain, or repel the defence, and find, or find not, that the Pannel should go, or not go to the knowledge of an Inquest; and if the Justices find the Pannel should go to the knowledge of an Inquest, either the Pannel confesses, & *quia in confessum nulle sunt partes judicis*, therefore he may be banished, or scourged, without being put to the knowledge of an Assize; as in *Rutherford's case*, the 9 of July 1622, and in *Fob's case*, who

was scourged, and banished for Bigamy, without an Assize, 19. January 1650.

But if the crime be capital, or the Pannel do not willingly acquiesce to the punishment, it is still securer to put the Pannel to the knowledge of an Inquest; because the Justices are only competent Judges to the relevancy, and the Inquest only can find the Libel proved.

IV. Albeit it be a received principle in our Law, that the Justices are only Judges to the relevancy, and Assizers to the Probation; yet to distinguish the limits of their different cognitions, becomes very oft difficult upon these two accounts, 1. By express act of Parliament, *Fa. 6. Par. 12. cap. 151.* it is Statute, that because parties were oft-times frustrat of Justice, by alledging irrelevancy against criminal Libels; therefore when the persons complained upon, are libelled to be art and part, no exception, or objection shall take away that part of the Libel in time coming; so that albeit the greatest debate concerning relevancy, amongst Lawyers in criminal cases, did arise upon these common places, *cujus ope, auxilio, assistentia, mandato, &c. ea crimina erant commissa*, and from what circumstances these could be interred, yet now the debate upon all this, falls not by that act, under the cognition of the Assize, all these being branches and qualifications of art and part. 2. The Probation requires oft-times in it, somewhat of relevancy, to be previously debated, as for instance, whether an extrajudicial confession is binding, or what Witnesses in Law are receiveable, or not; all which cases, do oft-times confound the cognition of the Justices, and Assizers; but for clearing of these limits, the following conclusions are to be observed, 1. That in *Dubio* all that concerns Law, is to be judged by the Justices, and what concerns fact by the Assize. 2. *Regulariter*, all that is in the Libel falls under the Cognition of the Justices, and therefore I will recommend it as a caution to Advocats, that

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when they are jealous of the ignorance of Assisers, and find the case intricat, that they do not simply libel, that such persons were art and part; but that they libel them to be art and part, in so far as they rescu'd the malefactors, &c. For when the qualifications, from which art and part are infer'd, are expressly libell'd; the Justices are judges to the relevancy of the inference, but if these condescend not that they are art and part, in so far as &c. then the Assizers are only Judges competent thereto, though the same be, *in apicibus juris*, because of the former act, as was found in Captain Barclays case, November 1668. where they refused to force the pursuer to condescend, *quo modo*, art and part; albeit this be very dangerous, seing Assizers are oft-times ignorant persons, and yet they forced the Pannel to condescend upon the particular qualification of self-defence, and would not refer to the assise to consider the qualities of self-defence, which would arise from the Probation, as to which I could never find any reason of disparity, but that by the act of Parliament; the one case is appointed to be decided by Assisers, whereas there is no Statute as to the other; but to speak ingeniously, I find no act of Parliament more unreasonable then this; for the Statutory part of that act, committing the tryal of art and part to Assisers, seems most unjust, seing as has been said before, in committing the greatest questions of the Law; to the most ignorant of the Subjects, is to put a sharp Sword in the hands of blind men, and the reason inductive of this act specified in the narrative, is likewise most inept, and no ways allative of what is thereby Statuted; since debates upon the relevancy could very litle have hindred, and never have hindred justice, for the relevancy is debated now, as copiously as before that act, with this only difference; that it was then debated before Judges, who could have kept Advocats at the point, whereas now it is debated before Assisers, who know not how to bound, or how to stop them. But a better rea-

son for this Law had been this, *viz.* That the pursuer is not allowed to examine the witnesses, and so is not presumed to know what they can say, and therefore he cannot exactly know all the circumstances, which are necessary for founding a clear condescendency in Art and Part, untill he hear the Witnesses depon. And seeing the Assizers are only Judges to the deposition of the Witnesses, therefore they ought likewise to be Judges to the qualification of Art and Part, but I think that after the Witnesses have deponed, the Justices should still determine, what is Art and Part, and should not leave the same to the Assizers, and as they are founded, *quo ad*, this upon the former principle, that they are only Judges to the matter of relevancy, so they are not excluded therefore by the foresaid act of Parliament, for it only ordains, that Art and Part being libelled, no objection shall take away that part thereof; And thus if a man be pursued as Art and Part of Murder, the Libel should doubtlesse go to the knowledge of an inquest. But when the probation is led, the Judge when he hears the Probation to run upon rescue, mandat, or ratihibition, should tell the inquest what Acts in Law do infer either of these, and then to leave it to them to judge, if these Acts which he declares to be relevant, be proved; And it is much fitter, then to leave poor ignorant Assizers, to the impression of Advocats, who may byasse them by their repute, authority, or confidence. 3, Albeit the Assize be Judges of the Probation, yet what manner of probation is requisite, belongs to the cognition of the Justices, and thus the Justices determined in *Balkanquels* case in *Anno 1665*. That witnesses could not be proved to have perjured themselves, by the depositions of other witnesses, but only by writ, or reexamination. And in the Action of Usury, pursued against *Witherspoon*, *March 1666*. They found, that Usury pactions, being extrinseck to the writ, could be proved by other witnesses, then the Witnesses insert. And in the case of *Wilson*, *November 1667*. they found, that the

the receiving more then the ordinary Rent, was not probable by the Oath of the payer, and yet if any of the Assizers pleases, he may desire *ad informandam conscientiam judicis*, any probation whatsoever to be taken; and thus often times in the criminal Registers, Assizers have caused read Testificats from Chirurgians, and others, *licet regulariter testibus, non testimonis est credendum*. The last rule is that before the Assize be sworn, all the cognition belongs to the Justice, but after they are sworn, the Justices *functi sunt officio*, and all thereafter falls under the cognition of the Assizers, as is clear, by the very words of the Justice Interloquutor, which runs thus, the Justices finds the Libel relevant, notwithstanding of the defences, and ordains the Pannel to passe thereupon to the knowledge of an inquest.

But to prevent all thir difficulties, I wish that the Justices were Judges both to relevancy, and probation, which overtire seems most fit, and advantageous for these subsequent reasons.

1. That there is such a contingency, betwixt relevancy, and probation that they should not be disjoyned, and sure they must best understand what probation is requisite, who have considered the relevancy, upon which it depends, and for this cause it is, that even our Law appoints all the dispute upon the relevancy, to be in presence of the Assize.

2. The Assize is oft stumbled at what is referred to them, and do very often mistake what is found relevant, and what not.

3. Assizers with us, are oftentimes ignorant persons, at least seldom or never are they so judicious, as to understand such intricate matters, as Advocats represent to them, especially in Circuite Courts, where few have seen Assizes before, and they are oftentimes but mean persons, or persons who have interest.

4. By our Law the Libel is relevant, if Art and Part be Libelled without condescending that they are Art and Part, in swae far as, &c. and the Assizers are only Judges to what is

Art and Part, so that in effect they are Judges to the relevancy of almost all cases, and are put to decide what has troubled the ablest Doctors and Authors, and so often times they return unformal verdicts,

5. Assizers are troubled in their commerce, and abstracted from their affaires unnecessarily, being obliged frequently upon continuation of dyets, to wait whole years and are oftentimes absent, whereby dyets are deserted, and they oftentimes tynd.

6. By this means, Assizes of Error would be suppress, with which Assizers are still threatned by the pursuer, before they be inclosed; and it seems Barbarous, that persons who absolve should be punished, whereas there is no punishment for condemning, which inconveniency would also be taken off by this overture.

7. Assizers may in our Law judge according to their private knowledge, without Lawful probation, which seems dangerous in Criminal cases.

8. Though of old when Judges, and Assizers were equally ignorant, Assizers were appointed, yet now when Law is formed to a Science, and that judges are presumed to be learned, and Assizers not, it seems reasonable they should be suppress, as well in Criminal cases, as they are already in Civil, and since we have receded from the present custom of *England*, and our own old customs, by not allowing Assizes in Civil cases, why not rather in Criminal cases, these being both of more intricacy and weight; especially seeing in *England* the probation is before neighbours in the Countrey, who know best the matter of fact, but with us Assizers are seldom or never choosed from the place where the crime was committed, but are Burgeses of *Edimburgh* who are as great strangers to what pass, as the Judges themselves; and if Assizers were to be brought from the Countrey, it would be very expensive.

9. The most learned and polisht Kingdoms, and Common wealths, who have formed their Laws in calm and learned ages make there Judges discusse both relevancy, and probation;
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and it is thought that either assisers have been introduced by us, when we and *England* were both barbarous, or else the Justices have invented this Act at first, to relieve themselves of a burden.

V. The Assize is either an ordinary, or great Assize, the great Assize is that, whereby an ordinar is tryed, if they do wrong, and I find some foundations for thir terms, *par la custum d. langumois, Act 4. & de la Rochal art. 1. la grand assise est du seneshal la petit du juge prevostal.* An ordinary Assize uses to consist of fifteen persons, but they may consist of more, or fewer if the number be unequal, and thus the pe- nult of *June, 1614.* *Ronald* was tried, and convicted, for dismembering *Donaldson*, by an Assize of thirteen persons. The reason why the Assize must be unequal in number, is, least by equality of Vots, affairs be not terminat, and brought to a speedy issue; for which cause likewise, *lib. 2. Reg. Maj. cap. 5.* and by the *87. Act 6. Parl. K. Ja. 1.* it is appointed, that arbiters should be appointed in an unequal number, and yet I find, that in the civil brief of right, an Assize should consist of twelve (worn men).

Albeit according to the Law of *England*, the Assizers must all agree in one voice; yet with us the major part may condemn, or absolve; but if six, or fifteen be only positive, and eight, *non liquets*; it may be doubted; if this verdict should condemn; for else if one did condemn, and fourteen were not clear, that one would condemn, which were most absurd; and in *July 1675.* a verdict in a Perambulation, betwixt, *Walstoun*, and *Sr. John Cheesly*, being quarrelled in an Advocation, as unjust; because the greater number, were *non liquets*, the Lords did Advocat the cause to themselves, which implied that they did not sustain the verdict as valid.

VI. The Assizers are ordinarily called by fives, and the Oath administrat to them, is, *That you shall all the truth tell,*

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and

and nae truth conceal; in so far as you are to passe upon this present Assise; swa help you God. Which I find likewise to have been the form of old, *Reg. Maj. lib. 1. vers. 12.* And albeit by the 138. *Act 13. Parl. Ja. 1.* it is ordained, that all Judges shall cause Assisers swear, when they take their Oath, that they have not taken any Buds from the Party, yet they do never tender to them this Oath; except either the Judge, or Party be jealous of the Assisers.

Assisers are partly Judges, partly Witnesses, as has been said before, they are Judges in so far as they consider the Probation led by others, and judge whether proved, or not proved: They are Witnesses in so far as they may condemn, upon proper knowledge, without any other Probation; And therefore whatever exceptions may be propon'd, either against Judge, or Witnesse, are admitted against Assisers; and thus an Assiser was set (for that is the term of declining used in this case) because he was not twenty five Years of age, which is the age required in a Judge, *Act 132. Parl. 12. Ja. 6. vid. 7. June 1616.*

But because the exceptions against Assisers, are ordinarily coincident with these, that are against Witnesses; therefore we shall remit them to the Title of Witnesses. Only it is fit to take notice that the Cherurgians of *Edinburgh* are exeemed, by *2. Mary*, from being cited upon Assises; because of the peremptoriness of the employment, which was sustained by the Justices, *July 1671.* both as to Assises within the Town, and without the Town, though our learned *Craig* being a Justice-Deput, had formerly sustained it as to Assises, without the Town only.

VII. It was a principle in the feudal Law, that all men should be judged *per pares curia*, the meaning whereof was, that a Vassal should be judged *per convassallos*; because it was presumed that these understood best the person to be tried, and

and the knowledge of the Pannels former life and conversation is a great help towards a sound judgement of the case; and from this feudal custom rises our maxime, that every man should be judged by his Peers *quon. attach. cap. 67.* The words are, It is Statute, that no man shall be judged by a lower person then his Peer, an Erle by an Erle, a Barron by a Barron, a subvassal by a subvassal, and a Burges by a Burges, but a lower person may be judged by a higher, and by the *chap. 2. Stat. Alex. 2.* A Knight should be judged by Knights, or free holders, but by an Act of Sederunt. 1. June 1591. The Lords of Session declared all such as were landed men, sufficient to passe upon Assizes of Error, though the old Laws required noble men, and Gentlemen only in such cases: And albeit of old it was uncontravertedly received, that none should passe upon the Assize of Noblemen except Noblemen, Nor upon the Assize of Barrons, except Barrons, yet of late it hath been much debated, and especially in the case of *Douglasse of Spot, 9. May, 1667.* at which time he being accused for killing *Horne of Eccles* it was alleaged, that *Spot* was a Barron, and so could not be judged but by Barrons, holding of the King conform to the citations above duced.

It was replied by His *Majesties* Advocat. 1. Neither the books of *quon. attach.* or the Statutes of King *Alexander*, are binding Laws, but only books of Apocripha. 2. Though they were Laws, yet they are not *in viridi observantia*, seing Burgeses and others are daily admitted by the late practise, to passe upon Barrons Assizes, and at the time of the making of these Laws, Assizers were Judges both to the relevancy, and probation, whereas now in effect, they are but witnesses; and therefore since the Law reposes much lesse confidence in them now, then formerly, it should not now be so scrupulous in their election. 3. Burgeses are in Parliament allowed to sit upon the Assize of, and forefault Noblemen, and it were against reason that they should be admitted to the more solemn
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Judicators, and be rejected in Judicators where cases of less importance, are ordinarily judged, and in which the Sentence pronounced may be easier repealed. 4. Dyets before the Justice Courts being alwayes peremptor, it is probable that dyets be- haved very frequently to be deserted, if only Noblemen were to be Judged by Noblemen, Barrons by Barrons. 5. By the state of King *Alexander*, above cited, it is only requisit that Knights be judged by Knights, but it is not added there, that Barrons should be judged by Barrons, which shews that that privilege, was not allowed to them, even in those dayes, and lastly, seeing all mens lives are of extraordinary concernment, it is not reasonable to think that he who can be judge of any mans life, may not be Judge of the lives of all men.

To which it was dplyed as to the first: That debate is opposed, whereby it is evinced in the Title, by what Laws Crimes are judged in *Scotland*, and the Books of *quon. attach.* and *Reg. Majest.* are our Law, and the A& of Sederunt above-cited, dispensing with that privilege in some cases, doth demonstrat, that regularly this privilege taketh place with us. Likeas *Skeen* in his Treatise concerning the procedure before the Justice General, *cap. 4. sect. 3.* cites these Laws as binding, and gives for a rule that no man can be judged in that Court but by his peers.

To the second it was dplyed, that this being a declinatur, and being arbitrary for parties, to plead the benefite thereof it cannot be said to be antiquated, unlesse it had been alledged that it had been pleaded, and repelled: But as this citation is out of *Skeen*, who is but a late Author, did show the same to be in *viridi observantia*, so Noblemen have lately had the same indulged to them, as in the cases of the Earl of *Traquair* and Lord *Ochiltree*, which was allowed to them upon the Laws here cited. To the third founded upon Burgesses sitting upon forefaulters in Parliament; the same doth not meet the case

ing the Parliament may abrogate Laws and so are not in their procedure tyed to them: and though Burgesſes ſinglie, be not peers to Noblemen, yet the collective body of the Parliament, by which they are condemned are much more their peers.

To the fourth, it was duplyed, that inconveniences are onely to be looked to in the making of Laws, but not after, and the inconveniences of the other ſide are much more preſſing, being very inconvenient, that an Aſſize of 15. mean Tradſmen, ſhould be admitted to try a Duke, or Marqueſſe; and it was a vaſt miſtake to think that Aſſizes are only witneſſes, and not Judges; ſeing they vote, and their verdict is called a Sentence, and if Art and Part be Libelled, the relevancy is in theſe caſes, (which uſes to be of all caſes moſt ſerious) Simply referred to them without any debate. To the fifth it was duplyed, that the inference is meerly conjectural, but if the Text be conſidered, it will appear that by Knight, there is meant Vaſſal, or free holder, for the *Latine* tranſlation underſtands the word Knight, not *eques* but *miles*, and it is ſaid there, that a Knight ſhall be judged by Knights; or free holders; So that the particle (or) is in that place exegetick, and not diſjunctive. And to the Laſt it is duplyed, that all mens lives are equally precious in the eyes of the Law, for even by the *Roman* Law, mean people were judged to dye for many crimes, which were not capitally to Noble *Romans*, and though with the puniſhment may be the ſame, yet the way of procedure againſt Noblemen is juſtly allowed to be more ſolemn. Upon ſuch debate, the Juſtices ordained a new Aſſize to be ſummoned, whereof the moſt part ſhould be Barrons, and the ancient landed Gentleman. It was thereafter doubted, whether an apparent Heir of a Baron, has the ſame priviledge, ſo that none can paſſe upon an Aſſize, who are not Barrons or Landed men; and it was alledged,

alleged, that the apparent Heir, had this priviledge, and was a Barron in the construction of Law, for his marriage, or escheat would fall, though not entered, and as a Barron though denuded, remained still a Barron, or a Prelat, though for ag demitting, would be still a prelat; so the apparent Heir of a Barron, though not entered, should be still a Barron, as was found, 23. December 1674. To which it was answered that an appearent Heir, was not *nomen juris*, and priviledge ought to be strictly interpreted, and the appearing Air of Barron, would not have an Heir, as was lately found in Sir Alexander Seaton's case, *quæ sequitur in comodum*, &c. Whereas by Law, all Barrons may have Heirs, nor did the instances adduced from the Casualties of marriage, or escheat militat in this feing these proceeded, *ex natura feudi, non ex vi privilegii* as was introduced in favours of the superiour, and not of the appearent Heir. Upon which debate the Justices, 19. of July 1675, repelled the objection against the Assizers, and found the priviledge extended not to the appearent Heirs of Barrons. *Mackintosh contra Frazer of Culbokie*. Nor is this priviledge extended to Landed men, though infest, if their Lands be erected in a Barrony.

VIII. Albeit it be ordinarily received, that Assizers may Judge upon their proper knowledge, yet the truth of the principle may be doubted, upon these reasons, 1. Because by the foresaid Act of Parliament, par. 11. K. Ja. 6. Probation should be led in presence of an Assize, and Pann but so it is, that the privat knowledge of Assizers, cannot be laid to be led before them. 2. If Probation were led publicly, defenders might propon interrogators, whereby the matter of Fact might be more fully cleared, and even the Witnesses own mistakes might be removed; of all which just advantages, he is precludit by that principle. 3. The great reason why by the act, Probation should be led in presence

the Pannel, is, because in Law its presum'd, a Witness will stand more in awe to depone falsely, in presence of the Pannel; then otherwise: for which cause, confronting of Parties, and Witnesses amongst themselves, when they are contrary, is much used, and treated of by the Doctors. 4. If assisers may give their verdict upon privat knowledge, then they could never be pursued for error; because if privat knowledge be the rule, I can hardly understand, how men can be convict, as having transgressed against that rule, seing albeit it be easier to judge what a man should know, yet it is impossible to judge what a man doth know. 5. By the Civil Law, and the opinion of almost all Divines, and Nations, *judices debent judicare secundum allegata & probata*.

IX. From the foresaid Act Parl. 11. ordaining all Probation to be received, and used in the presence of the Assisers, and Pannel, it may be deduced by a necessary consequence, that no Witness should be examined in criminals, *ad futuram rei memoriam*, and that no witnesses should be examined by Commission: and albeit, it may be objected, that *in crimine falsi*, the Probation led before the Lords, is not repeated before the Justice, and Assisers, before whom nothing is used to instruct the falsehood, but the Decreet of improbation pronounced by the Lords, for in that case, the Lords being by Act of Parliament, declared Judges competent to the cognition of Falshood, their sentence, *habetur pro veritate*, and is *probatio probata*; so that the producing of it, is the leading of Probation before the Assise. This priviledge, that no Probation should be led, but in presence of the Pannel, and Assise, may be past from by the Pannel, seing it is introduced in his favours: and therefore it was found, the 9. of March 1671. that the diet could not be continued against *Charles Robertson*, because of the absence of the Witnesses, seing he was content to stand to the Depositions formerly taken; but they caused him subscribe his consent,

After the Probation is closed, the Pannels Advocats makes a speech to the Assize, wherein the termes they use to them is, *good men of inquest*, and after they have ended, His Majesties Advocat speaks, but there are no Duplys, or Triplys used; and it was the priviledge of His Majesties Advocat to be the last speaker; which priviledge was assumed likewise by all other Advocats for the pursuer: but by the tenth article of the Regulations, 1670. the defenders Advocat is now the last speaker, except in the case of Treason, and Rebellion; so that this priviledge holds only in Perduellion, but not in ordinary Treason.

X. When both these discourses are ended, then the Assize are inclosed; but before they be inclosed, they should endeavour to be satisfied of any doubt; for if after inclosing any person speak to them, or if any of them come out of the place where they are inclosed, until the verdict be pronounc'd, the Pannel is *eo ipso*, clean and innocent, *Act 91. Parl. 11. Ja. 6.* the reason inductive of which act, seems to be, fear of impressing, or suborning the Assize, and therefore, the practice allows Assizers sometimes to send out some of their number to the Justices, to receive informations, in matters of fact, and finds that in so doing they transgress not this act, as in *Kennedies case*, August 1662.

And after a full debate, upon the 24. of December 1672. It was found, that any of the Assizers disclosing, and coming out of the house, after they had past a vott, though the verdict was not subscribed by the Chancellour, was not sufficient to annul the verdict, albeit it was here alledged, that there might be great debate upon the wording of the verdict, and so the Assize should not have disclosed, until the verdict was subscribed. By this act likewise the Assizers, and not the Justices are Judges competent to this exception against the verdict, as was found in the foresaid decision, 1672. wherein the Justices found, that themselves were Judges compe-

ment to the relevancy of any such alledgeance; but that it belonged to the Assize to judge the Probation of that exception, though it was alledged, that the Assizers could not at all be Judges thereto, seeing they were the delinquents in that case, and it most part of the Assize had disclosed, it were absurd, that they should be Judges to their own Delinquency. At that time the Lords did likewise declare, that if any Assizer should disclose before the votes were compleat, so that the verdict might be thereupon annulled, they were punishable by the Justices, and should be obliged to repair the loss, which either the King, or Party incurred.

So that Assizers are allowed to speak to Judges, or Advocates, but are not allowed to make any address to them after inclosure, as said is. It is likewise observable from this act, that albeit the Clerk be discharged to enter in where the Assize sits, after they have chosen their Chancellour, yet *defacto*, the Clerk sits still with them, and it was thought fit he should do so; because they being oft ignorant, and unacquainted with the forms, and procedure of that Court; they should have some person to regular them, and none so fit to do it, as the Clerk; yet by the late Regulation, 1670. it is appointed, that the Clerk shall not be present, and sure the Clerk was worth ten, and did influence too much.

XI. After the Assize are inclosed, they choose a President, who is called Chancellour of the Assize, and proceed to read, and thereafter to reason upon what is debate, and their determination is called the verdict of the Assize, which is subscribed by the Chancellour, it is called verdict, *quasi vere dictum*, and sometimes it is called, *verba curie quon.* *Attach. cap. ubi aliqua.* thereafter the Assizers enter again into the Court, and there the verdict is read, and the Chancellour stands up and owns the same, after the verdict is read, it should, and is by the 9. *Act of Regulations*, 1670. closed, and sealed with the Seals of the Court, of the Chancellour of

the Assize, and of so many of their number as the Chancellor shall think fit, never to be opened, but by orders from the Judge, of which verdict, the Clerk is to have the keeping, and if he open the same, he is to be deposed, and further punished as the Judges shall think fit.

It was thought of old, that Assizers behaved presently to determine, after Probation was led, and that it was not lawful to dismisse them until they did enter, and return their verdict, and the reason of that opinion is, because after the Probation is led, there may be hazard of suborning the Assizers, if the matter were continued to a new day, and it were to be feared likewise, that the pursuer finding that the Witnesses which he had led, did not prove, he might be tempted to suborn others, and I think this opinion strongly founded; but yet in *Anno 1665. &c.* a Baxter being pursued for Sedition, the Justices did, at my Lord Advocats earnest solicitation, dissolve the Court after Probation was led, and continued the matter to a new dyet, but the accusation was never further prosecute, and that procedure was thought, *malis exemplis*; yet thereafter His *Majesties* Advocat continued an Assize, who sat upon *Macknab* for theft, for not being clear to condemn upon an extrajudicial confession, they proposed the case after they were inclosed, whereupon the Justices continued the dyet till the next day, and having consulted the Council, they thereafter found the confession sufficient, and inclosed the Assize, notwithstanding of this objection, *November 1669.*

XII. When the Advocat closes his discourse for the pursuer, he protests for an Assize of error against the Inquest, if they assioilzie, which Protestation he causes to be marked by the Clerk, and it may be doubted, if the pursuer, or His *Majesties* Advocat can pursue the Inquest for error, if this Protestation be not used, even as a qualified Oath is not allowed.

lowed, except it be protested for. And it was debated in the case betwixt the Lady, and Laird of *Milntoun*, if a reprobator could be raised, where the party *laesed* protested not for it, seing Protestations were such solemn Acts as the Law required in such cases, and they were unnecessary, and superfluous, if what were protested for, could be allowed, without being protested for, and the party to whom such Protestations were competent, doth, *eo ipso*, passe from his right, and seems to acquiesce in what is to be done, if he use them not, *vid. Durand specul. tit. reprobatur in initio*, but this case was not decided; yet the Lords inclined to allow a reprobature if there was reason for it, though no Protestation was used; and I believe that action of error may be raised, though it be not protested for, if the verdict be quarrellable, though a Protestation be both more secure, and tormal, and really there is good reason why it should be used, seing the Inquest is by that solemn denunciation, and intimation warned of their hazard, and their error, because it becomes thereby more wilful then otherwayes it would be.

A Summonds of error is alwayes raised in Latine, and upon Parchment, and is direct out of the Chancery.

Wilful error is that crime which Affizers commit, in pronouncing an unjust verdict, and by our Law, an Affize condemning, cannot be pursued, *tanquam temere jurantes, supra assisa*, as is commonly believed, by the 63. Act 8. Par. *Ja.* 3. the reasons of which opinion may be three. 1. It is not presumeable, that indifferent persons would condemn an innocent out of seid or favour, though there be some reasons to be jealous, that they might be induced, out of either pitty, or clemency to assoilzie from a crime fully proved. 2. No person would be found to go upon an Affize, if they might be punished for condemning. 3. The penalty of such as *temere jurarunt super assisam*, is only confiscation of the moveable goods,

goods, *cap. 14. lib. Regiam. Maje.* whereas death would be oft-times the punishment, if such as condemned might be punished; yet I am of the opinion, that it the Assizers did condemn an innocent, without any Probation, or by palpable iniquity, that *eo casu*, they might be punished: And my reasons for this opinion, are 1. That else the people would be stated in a very unfortunat condition; if not only they lay open to the hazard of being condemned, upon the deposition of any two men, but likewise to the arbitrarinesse of an Assize, who might condemn without any clear probation. 2. Assizers are Judges, and Witnesses, and therefore must be liable to all the errors, for which these are accountable; but so it is, that if a Judge condemn unjustly, or if a person be condemned upon the deposition of any Witnesse, who deposes falsely, that Judge, or Witnesse so deponing, are liable to a capital punishment, why then should an Assizer be exempted, seing there is no expresse Law, upon which he can found that exemption: And in answer to the contrary arguments, it may be contended: That as to the first, it is not concluding, seing, else it might by the same argument be concluded, that no Judge, or Witnesse could be pursued, when they condemned unjustly, seing *omnis homo presumitur bonus*, at least Perjury should never be punished in a Witnesse, nor injustice in a Judge, deciding unjustly, and by that unjust decision, murdering the person pannelled before them; because forsooth it is not presumeable, that a Witnesse, or Judge would murder an innocent by their sentence, or deposition. To the second, it is answered, that all men may be forced to passe upon Assizes, upon their perril, and thus Assizers are forced, though there is hazard also in assailing and Witnesses are forced, though there be great hazard in Perjury, if they depon falsely. To the third, it is answered, that there needs no Law to punish Assizers, condemning un-

justly,

justly, seeing they are punishable by the Common Law. But that it was necessary there should be a particular Statute, to punish such as assilzied unjustly; both because the Common Law was not so expresse as to this, and because men might be induced to think, that there was no great hazard in it.

This error in Assizers, is to be tried by a great Assize, of twenty five Noble Persons, *Act 63. Parl. 8. Ja. 3.* but the person assilzied is to be free, *ibid.* And by an act of *Settlement*, of the Session, *Anno 1591.* it is declared, that all landed Gentlemen shall be in a capacity to pass upon an Assize of error, though they be of Quality, and Estate inferior to the Pannel, and wilful error is only punishable in this case, *qualibet probabilis causa ignorantia excusat*, *Spot. tit. Retours*, *Ker* against *Hartwood mres*, and by the *47. Act Par. 6. Ja. 3.* It appears, that no Probation can be adduced; to infer this action of error, but what was at first produced the time of their verdict; whereas any Probation may be adduced in fortification of the verdict quarrelled, (*tantus est favor innocentia*), the punishment of such as are found guilty by an Assize of error, is the escheating of the Moveables, and a Years imprisonment, *cap. 14. l. 1. Reg. Maj.* which is ratified by the *47. Act 6. Parl. Ja. 3.* where it is Statuted, that wilful, or ignorant Assizers, shall be punished after the form of the Kings Law, in the first Book of the *Majestie*, *Skeen* observes upon that place, *Reg. Maj.* that *amittere legem terra*, is the same, with *non habere per sonam standi in judicio*, and they can never be admitted thereafter as Witnesses, neither in Writs, nor in Judgement, *vid. tit. perjurie*. But to the end it may be known which of the Assize assilzied, it is by the *9. Article regul. 1670.* appointed, that the Chancellor of the Assize mark upon the same Papper, upon which the verdict is write, who condemned, and who assilzied, which

which Paper is to be sealed, and kept till a Summonds of error be raised.

The Council sometimes rescinds verdicts, without any action of error, *in criminalibus*, as in *George Grahams* case, where they ordain'd the verdict of the inquest, whereby he was found to be Art and Part of receipt of stoln Bonds, to be unjust, and restored him against the same, but it may be doubted, whether these who are unjustly condemned, may be restored against that verdict, though it be found unjust; seing these who are unjustly assolizied cannot be thereafter pursued, though the absolvitur be found unjust, *per argumentum à contrario*, *vid. titl.* of the Council, where this question is fully debated, and determined.

TITLE

TITLE XXIV.

Of Probation by confession.

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1. *Probation defined.*
 2. *Probation by confession if judicial, is the strongest of all Probations.*
 3. *In what case is an extrajudicial confession allowable.*
 4. *What are the effects of a qualified confession.*
 5. *The effects of a confession emitted before an incompetent Judge.*
 6. *How far a minors confession obliges.*

PROBATION is so fully treated of by the *Civilians* and *Cannons*, and we differ so little from them, that I shall only treat of it here in relation to our own Law.

I. Probation is defined to be, that whereby the Judge is convinced of what is asserted; and it may be divided in probation, by confession, by Oath, by Writ, by Witnesses, and by Presumptions.

II. Probation by confession is the most secure of all others, and therefore it is said in Law, that *in confitentem nulla sunt partes judicis*, suitable to which, such as confesse are oftentimes condemned without the knowledge of an Inquest, as I have more fully treated in the Title of Assizes, but because men

will sometimes confess a Crime, rather out of weariness of their life, then a consciousness of guilt, therefore the Law hath required, that if there appear any aversion for life *tadium vite*, or any signs of distraction, or madness, that these confessions should not be rested upon, except they be adminiculated with other probation: as also because confessions are oftentimes emitted negligently, the confessors thinking that their private confessions cannot prejudice them, therefore the Law doth only give credit to judicial confessions, and not to these that are extrajudicial, & *extrabancum*, which maxime is stronger with us, then elsewhere, because by a Particular Act of Parliament, *Fa. 6, Parl. 11. cap. 90.* All probation should be led in presence of the Assize.

III. This Maxime doth admit in *Farinacius* opinion, many limitations, as 1. That if the extrajudicial confession be adminiculated by other presumptions, it is sufficient, but except the presumptions be very violent, I cannot allow this limitation, seeing *confessio extrajudicialis in se nulla est, & quod nullum est non potest adminiculari*, and therefore some approve, *Bossius* who admits this confession, though adminiculated only to infer, *panam extraordinariam Sed non ordinariam*, for certainly such prevarication, and abusing of truth, and Judges deserves some punishment. The second limitation, is, that if the confession be admitted in presence of the accuser, and accepted by him, then it is valid, though extrajudicial; but this I allow not, because it is still extrajudicial, and the confessor knew that he should not die upon such a confession; for which reason likewise, I approve not the third and fourth limitations, which are, that if the extrajudicial confession be *geminata*, and reiterated, or emitted in presence of a multitude, or *ad exonerationem conscientia*, that then it should be valid; and I remember, that though Major *Weir* confessed Sodomy, and Incest to Ministers, and Magistrates jointly, for exoneration of his Conscience, in presence of many persons, that

that His Majesties Advocat took great pains to bring him to a judicial confession, as thinking the former not sufficient: and yet *Frazer* was condemned upon a confession, emitted before the Assembly at *Aberdene*, and other Noble men, though retracted, 1641. where this limitation is alledged upon, out of *Farinacius*, and this being represented to the Parliament, they refused to give their opinion, and referred all back to the Justices, who sustained the confession adminiculated, as said is.

The sixth limitation is, that an extrajudicial confession is valid, if upon Oath; but I allow not this, seing Oaths are not allowed in criminal cases, nor can the Pannel be forced thereto; and if he swear ultroniously, and undesired, the confession would appear to me, to be suspect, as emitted, either *per furorem, vel ex radio vita.*

The seventh limitation, is, that an extrajudicial confession is sufficient, when the crime confest consists, *in animo*, as for instance, if it were doubted upon what reason a person accused fled, or shot a Pistol, &c. But I neither allow this limitation, for else it should be as large as the rule, seing all crimes require, *animum delinquendi*; and yet I think that some circumstances of a crime, may be proved by an extrajudicial confession, and so this limitation may be true in that sense. All these limitations are largely, rather then exactly set down, by *Farin. de reo confesso, quest. 81. Reg. 10.*

Confession though extrajudicial, may be sufficient (if adminiculated) to subject the confessor to the torture; but this is rarely praizized with us: But I remember to have seen *Mitchell* lately tortured, upon his retracting a confession emitted by him, in presence of His Majesties Privy Council, and a confession extorted by torture, is in no Law sufficient, so that except it be adhered to, after the person tortured is re-

moved from the Rack, for two or three dayes, it makes no Faith, *Farin. de reo. confesso. cap. 3.*

The custome with us, is, that the Advocat doth in presence of the Justices, examine the party to be accused, and if he confesse, either he subscribes his confession, if he can write, or else the Justices subscribe for him, or which is securer, makes two Nottars, and four Witnesses subscribe; and albeit a confession thus subscribed by two Nottars, before four Witnesses, was found sufficient, upon the 7. of December 1669. in the case of *Finla Macknob*, who was pursued for Theft, yet it was then alledged, that the confession was not sufficient, and that for these reasons. 1. Because all Probation should by the A^c of Parliament foresaid, be led in presence of the Assize; and therefore when the Probation was founded upon confession, the confession should have been originally emitted in presence of the Assize, or at least adhered to before them, and the testimony of two Nottars, and four Witnesses, was not equivalent to a verbal confession; seeing they could not thereby know all the circumstances which are necessary to be known, such as whether the confession was voluntar, or extorted, or if it proceeded upon a mistake, or if it was founded upon promise of life, &c. 2. The party who confessed might have emitted that Declaration, upon a confidence that the same could not operate against him, being extrajudicial, as said is. 3. That must be accounted an extrajudicial confession, *qua non emanavit in judicio*, and this is such; because there was no Court fenced here, nor yet an Assize sworn, whereas that is only called a judicial confession, which is emitted before those who are Judges, and whilst they are sitting in Judgement, *Boss. tit. de confessis*. 4. The confessor here was an ignorant person, and did not understand the *Scottish* Language, and so might be very subject to mistake; upon which reasons, the Assize having demured; the Justices made application to the Council, but the case being by

the Council remitted intirely back to themselves, they did find the foresaid confession sufficient, and *Macknab* was thereupon convict accordingly, and hang'd; but if the confession had only been subscribed by a Judge, I think it could not have been valid, for that were to confound the Office of a Judge, Witness, and Clerk, and would tend to make all Judges arbitrary; so that the life of the Leidges should depend upon one single Testimony, which were very dangerous, especially in inferiour Courts, where it is very well known that persons of very little integrity sit as Judges, and which Judges are oftentimes interested, to get the Pannel condemned, because thereby the Escheat, at least a part of it falls to themselves.

So far doth our Law require judicial confessions, that it hath been debated, that even a confession taken by all the Justices sitting in Judgement, was not a sufficient warrant, for the Assize to proceed in condemning the party, except the confession had been renewed before them, though the confession it self was subscribed, and the subscription acknowledged, for the foresaid Act of Parliament requires, that the hail Probation should be used before the Assize, in presence of the party accused; but so it is that the emitting of the confession is a chief part of the Probation, since Law has laid great weight upon the way and-manner, how a confession is elicite, measuring exactly the degrees of constancy, or fear, appearing in the Pannel, as well as considering the motives by which he was induced to confes, and what difference is there, *quo ad* the Assize, Whether the confession be emitted before the Justices, or an inferiour Judge, or why should not the deposition of Witnesses, or confessions of Parties, taken by way of precognition proved? and yet thir confessions taken before the Justices prove. But to this it is answered, that confessions emitted in presence of a Judge competent, prove in all Nations, from which the foresaid Act should not be made

to derogat, except it designed the same clearly: but so it is, that it is clear by the foresaid Act, that it was not intended, that any Probation that was formerly good, and Probative, should be discharged; but only that the way of using the same should be regulat, and so subscribed Papers are not rejected, for we daily see that Papers prove Treason, and Usury, though they be not subscribed before the Assize; but that Act only discharges a former wicked custom, of carrying in Papers claudistinely to the Inquest, which had not been openly used before the Pannel. Likeas, Assizers do frequently condemn with us upon such confessions,

The second question which may be here debated, is, whether when a person confesses a crime with a quality, and not simply, if his confession may be divided, so that he may be convicted upon the confession, notwithstanding of the quality, except he can prove the quality, this was debated the 13. of March 1668. At which time, one *Dumbar*, being pursued for wounding Collonel *Innes*, confest that he wounded him, but he did it in defence of his own life, being assaulted by the said Collonel; upon which confession it was alledged, he could not have been found guilty; since a confession can no more be divided, then an Oath, and it is a brocard in Law, that *quod approbas non reprobas*: As also, seing the crime could never be proved, but by the confession, the confession being qualified, was no confession without the qualification, and therefore there was no Probation beyond the quality; I know that the Doctors do in this case, distinguish betwixt such qualified confessions, as are omitted, *sub unico fructu verborum*, as if the confession did bear, I did kill in my own defence, *vel sub duplici*, as I did kill, but I kill'd in my own defence; in the first, they think the quality cannot be disjoyned from the confession, but in the second it may; yet I think this but a subtilty, for poor persons especially when they are tyed for their lives, take not such pains to

der their expressions, and their design in both is the same, but I approve more that other opinion of these, who think, that such qualified confessions may infer an arbitrary, though less punishment, *panam non ordinariam, sed extraordinariam*, as is asserted by *Decius in cap. cum venerabilis extra. de except. vid. Far. de reo confesso quest. 87. cap. 4.* And albeit I think, that if there were strong presumptions against the confessor, as there was in the above related case, he behoved, *co casu*, to prove that quality of self-defence, otherwise then by adjecting a quality; because Presumptions transfer the necessity of Probation, upon him against whom the presumption is brought, *Cod. sub. de sicar. def. 6. non scinditur confessio in criminalibus nisi adsint contraria indicia.* Yet I think, that such qualified confessions as this is, which imply a defence, should either prove the defence, or else they should not prove the Libel, and either should be altogether believed, or altogether reprobated, for as it was not the design of the confessor, to bind a guilt upon himself by the confession; So it is to be presumed, that he who is so ingenuous as to confess a guilt against himself, would be likewise so ingenuous as to confess the Truth really, and sincerely, or if he omitted this confession by a secret impulse, of a Superiour Power forcing him to confess the Truth, we may rationally conclude, that the same impulse would likewise have inforced him to confess the Truth in its tulness; and simplicity, & *homicidium inducio non dolose sed ad defensionem factum praesumitur & sic qualitas adjecta habet pro se presumptionem*, *Mascard. de probat. 2. conclus. 867.*

I do likewise think, if the quality, was not annexed to the first Deposition, that it should not afterwards be received, since it is presumeable, that it would have been adjected at the beginning, if it had been true; every man being more mindful to defend himself, then to confess a crime; and that notwithstanding of such a quality adjected, *ex intervallo*, the con-

confessor may be punished, *pena ordinaria*, which is also the opinion of *Clarus Quest. 55.*

V. The third Question is, whether a confession emitted before a Judge, who was not competent to punish corporally, be sufficient for a Judge to proceed who is competent, and this is oft contraverted with us, if a Confession, or Probation led before a Kirk-Session, be sufficient, if it be repeated before the Justices, and the Council being consulted lately by the Sheriff of the *Merse*, concerning a man who had confessed witchcraft, before the Presbytrie, they would not decide it, albeit Lawyers who were Members of the Council: And others were of opinion, that he should dy, except he could alledge a sufficient reason for varrying in his confession, but this is against a received position amongst Lawyers; *quod confessio emanata coram iudice incompetente non sufficit ad condemnandum Farin. de reo. confess. cap. 6. licet sufficiat ad torturam & habent vim extrajudicialis confessionis*, the reason of the foresaid Rule is, that the confessor knows that he could not dy upon that confession, and men will confesse many times to free themselves from trouble, or evite excommunication, who would not acknowledge a crime, if they were capitally accused; Some also have confessed to Kirk-Sessions, crimes, of which they have been innocent, as Adulteries, for obtaining a divorce, and Fornication, to obtain a consent of the Father, and whatever may be alledged against extrajudicial, may be alledged against *confessions*, before an incompetent Judge. By this also it may easily appear, what should be answered to another Question, which differs little from this, *viz.* If a confession of a crime taken incidently, in another Proces, and not taken in Proces, wherein the confessor is pursued for life, be sufficient to infer death.

The Lords of Session would not sustain a confession omitted by a man before the Kirk-Session, *ad exonerationem conscientie*

scientia, to operat against him in any other Court; because they thought that this would continue men in impenitency, and retard their repenting; which Decision was much applauded, *licet*, ὁ ἐν βυματὸμολογησας οὐ καταδικασθεὶς ἐστίν.

V I. By the Civil Law, *l. clarum C. de autoritate prestanda*, minors accused, could not prejudice themselves by their own confessions; but this is innovat by the custom of all Nations, *Boer. decis. 63.* and *Boss. tit. de confessis*: and with us, *Minors* confessing crimes, are thereupon executè; and I find in the Journal Books, instances thereof, in very young persons, but I think there is much left in this case to the Arbitrariness of the Judge, who should distinguish betwixt such crimes as fall under sence, as Murder, and such as principally require Judgement, as Blasphemy, Witchcraft, &c. In which last, hardly should *Minors* be punished, *pena ordinaria*, upon their own confession, and scarce after they confess, for a *Minor* is presumed to have no solid judgement.

Though a *Minor* may bind a crime upon himself by his own confession, and may be thereupon condemned, and executèd: yet whether he may revoke this confession, and be reponed against the same, because of his minority, was debated the 28. of February 1676. in the case of a young boy called *Kennedy*; and that he might be reponed, was urged from these reasons, 1. A *Minors* lubricity of judgement might prejudice him as much in criminals, as in civil cases, and therefore he ought to be reponed against the one, as well as against the other; and it were absurd, that a *Minor* should not be able to bind himself in the value of ten Pounds Scots, and that yet he should by his confession make himself liable to death. 2. Lawyers are very clear, that a *Minor* may revoke a criminal confession, *l. 4. C. de autoritat. prestand. Clar. quest. 53.* and *Gomez.* gives an instance of a *Minors* being re-

poned against the confession of Incest. 3. In this confession, a *Minor* might have much more easily lapsed into a fatal error; then in any other cases; the subject matter of this confession being a contrivance to poyson by Droggs, and Medicaments, in which, *non constat de corpore delicti*, since the Defunct might have dyed of another disease, and as to which, a *Minor* might easily have been mistaken, since to give a solid judgement, in such cases, or to confesse what relates thereto, requires not only more reason, but more skill and art, then can be expected from so young a boy. To which it was answered, that since *Minors* may be punishable for crimes, they may consequently bind a guilt upon themselves, by their confessions, for if the Law did not consider them as so far, *doli capaces*, that they understood the hazard of a crime, it would not punish them, and if they understood the nature, and hazard of a crime, it is unreasonable to think that they may not understand their hazard in confessing it, since in committing crimes, the judgement of the wisest is ordinarily blinded with passion, and errour; but in confessing, men have time and leasure to be judicious, and serious; and if *Minors* confessions could not ty them, they might still in absence of Witnesses commit crimes at their pleasure. 2. Lawyers as well as reason are very clear, that a *Minor* cannot be restored, except he shew that he was circumveened, or leel'd by his confession, as for instance, if he should confesse simply that he killed a man, but should forget to add that he killed him in self-defence, or should confesse that he committed Incest; but should forget to add that he was ignorant, that the person with whom he committed the same, was within the degrees that inferred Incest: which opinion is to be seen, in *Oddo. 5. Fortia. quest. 23. num. 9.* Or if he had confest upon the promise of inlemnity, or by the fear of threatenings, and were able to prove either, and by this just temper,

ment, the interest of the Common-wealth, and the imbecility of *Minors* are both saved: and therefore when Law, or Lawyers say that a *Minor* may be restored against his confession, their meaning only is, that he may be restored if he can prove his error and mistake. 3. This being a confession twice emitted, and adhered to, and adminiculated by the confession of other dying persons, who could not clear themselves by syling him, there can no doubt of its truth remain with any disinterested person. This case was not decided, but I conceive that a *Minor* cannot be restored against his own confession, except he shew, wherein he was either circumveen'd, or mistaken. And if a person past 21. years of age, can prove, that he has confest what was not true, he ought to be restor'd: as for instance, if he can prove that the man whom he confest he did kill, is still alive. In which sence I take *l. 1. S. D. Severus. ff. de pœnis, D. Severus rescripsit, confessiones reorum pro exploratis criminibus haberi non oporteri.* And when the *Eclog.* sayes, *cap. 4. περι ομολογησαντων.* suitable to *l. 4. ff. de confessis. ο του φονευθεντα δαλον, ανεχειν ομολογων, ει και ην αιτιαν ως ομολογων κραταιται, qui servum occisum intermisit se fatetur, licet non occiderit, ex confesso tenetur.* This is to be so interpreted, that a man past 21. may be executed upon his own confession, without enquiring whether what he confest be true. But it doth not follow, that if the confessor can prove he confest what was false, he ought not to be repon'd.

T I T L E XXV.

Probation by Oath , by
Write , and by Pre-
sumptions.

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1. *In what cases is a Pannel obliged to give his Oath.*
 2. *Whether a Pannel is obliged to depon , when the Judge declares that his deponing shall not infer a corporal punishment.*
 3. *In what cases can crimes be proved by Write , and Whether a Write that is null can prove a crime.*
 4. *How far can a crime be proved by presumptions.*

I. **P**robation by Oath , is not regularly admitted in criminal cases, for the pursuers Oath is never probative, even in civil cases, except it be adduced in supplement; but the Oath of supplement by the pursuer, is used upon no occasion in criminals : Neither is the defender forced to give his Oath in criminals, as he is in civil cases, both because it is unjust, to force a man to condemn himself, and because it is most probable, that he who is accused for a crime, would hazard his Soul by Perjury, to redeem his Blood, by an Oath. But because the excessive love which we bear to life, is the occasion of this exemption; therefore where the

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punishment is not corporal, & *corporis afflictiva*; the defender will be forced sometimes to give his Oath, as in the case of Riots, and Blood-wyts. Sometimes likewise the Law, because of the scantness of the Probation, obliges him who is accused to give his Oath, as in the case of Usury, which is a crime odious in it self, and clandestinely carried on, *Fa. 6. cap. 247. Par. 15.* And in the case of Simony, *Fa. 6. Parl. 21.* yet neither of these crimes are corporally punished, and therefore these rules may still hold. 1. That Probation by Oath of the defender, is never allowed by Law, neither *ubi pana est corporis afflictiva, nec ubi infamia irrogatur, quia nemo tenetur probare suam turpitudinem, & fama & vita quoad hoc equiparantur.* 2. That a person accused may be obliged by an express Law to depon, though the crime for which he is accused, may infer Infamy. 3. That no Law should force the defender in a criminal Process to swear, where the crime may infer death, nor have we any such Law in our Kingdom.

II. It is oft contraverted, both in the Council, and Criminal Court, whether though the crime be in it self, such as deserves a corporal punishment, yet if the pursuer, and His Majesties Advocat likewise declare, that they will not pursue the crime criminally, & *ad panam corporalem infligendam*, if confessed, the defender may not be forced to depon, which question may be resolved, by these conclusions, 1. That though the pursuer declare that he will not insist criminally, yet that declaration is not sufficient, because His Majesties Advocat may pursue. 2. Though His Majesties Advocat concur with the pursuer, in the declaration; yet it is not sufficient, seeing His Majesties Officers cannot prejudice His Majesty by any Declaration of others, for else they might by such Declarations as these, in effect remit crimes. 3. The Declaration of the Council is not sufficient, because they may not prejudice a criminal action, which may be intended before the Justice

stice Court, as was found in the case of some Gentlemen, and others, who being pursued before the Council, as *Plagiaries*, for taking away *Anna Gibson*, it was found by the Council, that they were not obliged to swear, though both the pursuer, and Advocate declared they should never be criminally pursued. 4. I conceive that neither the Declaration of the pursuer, nor defender, even in a criminal pursuit before the Justices, though agreed to by the Justices would not be sufficient to force the defender to swear; for I think, that though the defender should, *eo casu*, upon Oath deny his guilt, that he might be of new pursued, and convicted upon clear Probation; for His Majesty, and the Publicks interest can never be prejudged by any Declaration of His Officers, nor can any remit crimes, as I said formerly.

III. Crimes do not ordinarily use to be proved by Write, and when they may be so proved, there is little difficulty as to the Probation; only it may be observed, that it was found in the crime of Falshood, pursued against Captain *Barclay*, that a Write may be proved false, without production of it; and in *Purdies* case, that a discharge was sufficient, to prove *Ursury*, though it wanted both Writers name, and Witnesses, seeing the pursuer offered to prove the subscription by his Oath; but it is observable that Pannels are in *Ursury* obliged to swear, and therefore it may be doubted, whether a Write not subscribed before witnesses, doth prove a crime; since all writes of importance, are by Act of Parliament declared null, if they want the Writers name, and Witnesses; and if they be not believed, *quo ad*, a civil effect, much lesse in a criminal; nor is the Pannel here obliged to make up the same by his Oath, as in civil cases: And yet the Marquess of *Argile* was convicted of Treason, upon Letters written by him to General *Monck*; these Letters being only subscribed by him, and not Holograph, and the subscription having been

been proved, *per comparationem literarum*, which were very hard in other cases; seing *comparatio literarum*, is but a presumption, and mens hands are oft-times, and easily imitated, and one mans write will differ from it self at several occasions.

IV. Presumptions are divided, in Presumptions that are violent (for strong Presumptions are so called) and these that are not violent, they are likewise divided, in *presumptiones juris*, & *presumptiones juris & de jure*.

Whether crimes may be proved by presumptions, is much controverted, both in Law, and Practique, and that they cannot be proved by presumptions, is inferred from these reasons, 1. Presumptions are only founded upon verisimilitude, and what may be, may not be; whereas all Probations, especially in criminals, should be infallible, and certain, & *conclusio semper debet sequi debiliorem partem*. 2. If crimes could be proved by presumptions, Judges would be arbitrary in all cases, seing the Law cannot determine the number, and weight of Presumptions, as it doth in other Probations. 3. The Doctors universally conclude, that Presumptions do not prove crimes, as is clear by *Mascard, Farin, &c.* Upon the other hand it may be argued, that a crime may be inferred from Presumptions, and that for these reasons, 1. *l. Cod. de probationibus ubi aserit posse crimina vel idoneis testibus vel apertissimis documentis vel iudiciis indubitanis probari & l. 2. ff. quon. appell. non recip. ubi jubetur curialis observare ne quis homicidarum Adulterorum, &c. Argumentis convictus, testibus superatus, vel voce propria confessus audiatur appellare.* 2. Since Witnesses are only believed, because it is presumed they will not damn themselves; why may not other Presumptions be likewise received? 3. Presumptions are in many cases allowed as a sufficient Probation, as the presumption of Cohabitation, after the parties are discharged, is sufficient by Act of Parliament, to infer Adultery.

ry. 4. The depositions of Witnesses are oft-times founded upon Presumptions, as when they depone upon *dolus malus*, ebriety, or any other thing which depends upon acts of the mind. 5. Many have been condemned upon Presumptions, as *Fanet Brown*, who was convicted for Murder of her own Child, upon presumptions, and hang'd accordingly, the 25. of *June 1614*. And *Scot* was convicted, and hanged for killing of *Drumlanrigs* Sheep, the 20. of *February 1616*. And after a solemn debate, how far Presumptions could prove in criminals: in *Alexander Kennedies* case, he was convicted, and hanged for falshood, upon Presumptions in *Anno 1662*.

This difficulty hath forced some of the Doctors to conclude, that this case is arbitrary; and others to conclude, that Presumptions may inter, *panam extraordinariam, sed non ordinariam*, *Cod. fab. tit. de pan.* which last opinion, is upon the matter coincident with the first; for in arbitrary cases, the Judges can never proceed to death, and it seems that both these opinions are well founded, because not only the committing of crimes, but even the giving of scandal, and the doing that which is like a crime, deserves to be some way punished; but this arbitrariness should only in my opinion, be allowed to the Council, who are a supreme Judicatory, and are in such extraordinary cases, tyed to no express Law.

TITLE XXVI.

Probation by Witnesses.

1. *How witnesses are cited with us.*
2. *Who are testes ultronei.*
3. *What witnesses are not worth the Kings unlaw.*
4. *When women may be admitted to be witnesses, and when not.*
5. *How minors are to be admitted witnesses.*
6. *Persons guilty of crimes cannot be admitted.*
7. *Persons within degrees defendant, are not admitted, and who these are.*
8. *Domestick servants, when admitted.*
9. *Moveable Tennents.*
10. *Socius criminis.*
11. *Defenders cited as parties.*
12. *What time is considered in the hability of a Witness.*
13. *Whether Witnesses inhabile, may be received at His Majesty's instance.*
14. *Who are testes singulares.*
15. *The contrariety in depositions considered.*
16. *Causa scientiæ.*
17. *Witnesses, ad futuram rei memoriam.*
18. *It is now necessary to give in a list to the defender, of the witnesses*

- witnesses names: who are to be led against him.
 19. Absent witnesses how punished and compelled.
 20. What number may be cited for proving each crime.

IF the crime be pursued by raising of a Summons, that Summons contains a warrant to cite witnesses; but if the pursuit be by way of inditement, the Justices grant warrant by precept for citing of Witnesses,

At the day of comparance, the pursuer gives in with his execute Summons, executions likewise against the Witnesses, and if the executions against the Witnesses, be not legal, the dyet is deserted; But if the witnesses be lawfully cited, and compar not, of old, there was a warrant given to apprehend them, and the dyet was continued, but now there are formal Letters of Caption, given under the Signet of the Session, and not of the Justice-Court, and the Letters are still raised by the Justice-Clerks deput, who is the ordinary Clerk of Court; And if the Sheriff refuse to apprehend the Witnesses by vertue of the Caption, the Letters will be direct against himself, as in civil cases, and this was first observed in the cases of *Mac-kalla* against *Lindsay*.

After the Justices have found that the Pannel should go to the knowledge of an Inquest, he asks the pursuer what way he will prove his Libel: and if the probation by witnesses be chosen as the manner of Probation to be uted.

II. The Justices desire the Clerk to call the Witnesses, and if any be given in, in the list, against whom there is no formal execution; it is alledged they cannot be received, and this is the first objection against the witnesses, and is founded upon this reason *viz.* that he who offers himself to depon, without being lawfully cited, is presumed to be too desirous to depon, and so to have malice. These the Civil Law calls *testes ultronii*, yet I find that

that the Justices sometimes receives witnesses cited, *apud acta*, as *Alexander Forrester* against a Witch, the 3. of August 1661. So though they will not receive a witness, who appears upon an unlawful citation, and which he knows to be unlawfull, yet they will receive some, though not at all cited; for the first show a compliance, but not the last, all the objections against the Witnesses are discusst before they be sworn, for it is below the Majesty of an oath, to administer it the same unnecessarily, before it be known whether the person to whom the oath is to be administered will be received.

To object against a witness in our Law, is called to *cast a witness*, or to *set him*; and by the Doctors it is called to *repel a witness*, but because objections against the witnesses, or *oppositiones contra testes*, as *Farinacius* calls them, are so largely treated of by him, and others, I shall therefore only take notice of some particuler objections, which are mentioned, and made use of frequently in our Law, and practise. And in Law these objections are divided into such as are used *contra personas testium*, and these which are used *contra dicta testium*, I shall therefore first treat of these objections which are used *contra personas testium*.

III. Witnesses are not admitted with us, if they be not worth the Kings unlaw, which we interpret to be ten pounds; and because no man can know the value of anothers estate, this objection is found therefore only probable by the oath of the witness himself, as was found in the case of *Ruchead* against *Muire*, the 9. of December 1668. But this seems strange; for since the Law is jealous that he will depon unjustly, why it should believe him as to his own quality; and therefore I think that in Criminal cases, when the hazard is so great, the being known to be an actual beggar, should be sufficient, *per se*, to cast a witness, without referring the same to the witnesses oath.

This objection is founded upon the presumption, that such

as are poor, are liable to impressiō. And such as are poor are expressly repelled from being witnesses, by the 34. cap. stat. 2. Rob. And they were likewise repelled by the Civil Law.

IV. Women *regulariter* are not witnesses, neither in Civil nor Criminal cases with us, nor should they make as much faith with us *in criminalibus*, as is allowed by the Civil Law, and Doctors: seeing with us they are excluded from being witnesses even in Civil cases, *ergo à fortiori*, they ought to be rejected in Criminal cases; for albeit the Doctors allow them sometimes to prove in Civil cases, yet they reject them in the same causes, when they are Criminally pursued, as in *Furto*, &c. *Farin. quest. 56. num. 31.* and by an expresse Act 1. Agust 1661. The Justices ordained, that no women should be examined as witnesses in Theft, for the future, except *ex officio*, & *cum nota*: and that same day they received *Elisabeth Watson*, as witness in Theft against *Bruntfield*. 2. Women are sometimes received witnesses in some cases, *ob atrocitatem criminis*, as in Treason, by an expresse Act of Sederunt 1591. And in Witch-craft, most ordinarily, as is to be seen by the Books of Adjurnal, and particularly in the Process of *Margaret Wallace*, the 20. of March 1662. where *Margaret Grabame*, and *Marion Wear*, are received witnesses. 3. They are admitted *in criminibus domesticis*, because of scantness of probation; and thus they were received against *George Swintoun*, who was accused for murdering his own wife, within his own house, 21. Agust 1664. 4. Women are received witnesses, where women use only to be present, as in the being brought to bed, murdering of Children, & *in partu suppositio*, &c: very many instances whereof are to be seen in the Adjurnal Books. And yet *Farin. quest. 59.* sayes *mulier non potest esse testis*, & *quo ad suppositionem partus si inde agitur criminaliter, ad suppositionem corporaliter puniendam*: And by these we may conclude that women are not *regulariter* admitted witnesses in Scotland. Like as by the 34. cap.

Rob.

Rob. 1. These are expressly excluded from witness bearing; yet *Mathews* concludes they may be received witnesses, *ex hoc, quod mulier adulterii condamnata non admittatur, ergo in aliis mulieres admitti debent*; But this opinion is contrary to all the Doctors, *vid. Farin. quest. 59. casu, 1.* where he gives it for a rule, that *mulier in criminalibus testis esse nequit*, which rule extends so far that according to his judgement, three or more women cannot prove a crime, *num. 29.*

The reason why women are excluded from witnessing; must be either that they are subject to too much compassion, and so ought not to be more received in Criminal cases, than in any Civil cases; or else the Law was unwilling to trouble them, and thought it might learn them too much confidence, and make them subject to too much familiarity with men, and strangers, if they were necessitated to vague up and down at all Courts; upon all occasions.

V. *Minors* if they be past fourteen years of age, and no otherwise, may be admitted to be witnesses, by the foresaid Act of *K. Robert*, and it being alledged in the Proces of *Margaret Wallace, 1622.* That *Margaret Graham* could not be received a witness, because she was not past eighteen years of age, this was repelled, because a Testificat bore, that she was past fourteen years of age, and might be man'd. The reason of this objection, is, because *Minors* understand not to answer all circumstances, which must be necessarily considered by the Judge; nor yet the nature of that Oath, which should overawe them, and they are very subject in their youth to corruption; a clear instance whereof, I saw myself; in a little boy, against *Towie*, who after he was received; did first depose many improbabilities, and seemed terrified with every question, and thereafter confess that he was bribed, with a very small and childish bribe. In many cases likewise, witnesses are to depose upon that which requires judgement, as in proving self-defence, ratification, &c. And in these cases, it

is requisite that the deponer be of a more advanced age than fourteen.

VI. By that Act likewise of *K. Rob.* such as are Furious Adulterers, Robbers, Thieves, Perjured, Scourged, and Servants cannot be received witnesses; nor yet Laiks against Church-men, nor yet Church-men against Laiks: whereas according to the Cannon Law, *cap. de cetero decret. de testib.* Laiks are forbidden to be received against Church-men, *sed non contra.* The reasons of which constitution, are given to be partly the reverence due to Church-men, and partly the hatred whereby Laiks do persecute them; but this objection is justly repobated by our custome: by which likewise Servants are received to be witnesses, notwithstanding of the former Law against it; but not for their Masters: but whether he who hath redeemed himself from Justice by a Remission, should be received a witness, may be contraverted? and that he should not be received, may be argued, 1. Because of this Law of *K. Rob.* which doth expressly repel him. 2. A Remission takes not away the guilt, but is only a defence against the punishment; *l. Fin. C. de gener. abolit.*: And *semel malus semper præsūmitur malus*, which wicked disposition cannot be altered by a Remission; and since the King cannot make a man good, it follows, that he cannot make him a sufficient witness. 3. It hath been found by several Decisions, that a person convict, and brought off by a Remission, *redemptus à justitia*, as this Law calls him, hath been therefore set, from being a witness, as in the case of *Tossosh*, who was condemned as a false Nottar, and was thereupon set from being a witness, in the Proces, for burning the House of *Frendraught*; and yet I my self have objected this against an *English* Captain, in *Argiles* case it was repelled. But to reconcile these two opinions, I think we should distinguish betwixt such as make use of the Remission, before they be convict, and these who are convict, and thereafter make use of

the Remission; for those who propon upon the Remission, *eo ipso*, acknowledge the guilt; yet that it is only *fictione juris*: And therefore the foresaid Law sayes, copulative that *convicti, & redempti à justitia non possunt esse testes*.

Guiltiness which casts a man from being witness, must be proved by a sentence, and it was not found relevant, that the Theft was offered instantly to be proved, the 10. of February 1673. in *Ashintillies* case; but it would appear, that sometimes the Theft is so recently committed, that there could be no time for convicting him; and yet it were hard that a person so guilty, should be received. The dependence also of a criminal pursuit against a witness, should cast him, if it was intended before his citation, to be a witness, else every witness might be cast, by intending a criminal pursuit against him.

VII. These within degrees defendant, by blood, or affinity, are likewise repelled by the foresaid Act. Degrees defendant, are by our Law the fourth degree, or Cousen Germans, as is expressed in the foresaid Chapter, and this term comes, in my opinion, from the French word, *defendre*, to forbid, so that degree *defendu*, is the true expression, though we say *defendent*, by corruption of the word. Excommunicat persons cannot by that Law be witnesses, nor such as are incarcerated: yet *de practica*, such as are incarcerated, are received, except they can be cast by some other objection. Nor such as are accused for a criminal Cause, during the dependence of the Proces: nor such as are of the pursuers Counsel: which objection is, *de practica*, called the giving of partial counsel, and this is only proved by the defenders own Oath, properly; yet the being present at a consultation with the pursuer, or the solistings to him, are likewise branches of partial Counsel, and are probable by witnesses.

VIII. Domestick servants cannot be received witnesses for their Masters, albeit they may against them, but if they be not servants the time of the deposition, they may, except their Master hath put them away, *dolose*, that he might use them as witnesses; but it may be contended, that if he put them away since the Citation, to depon; they cannot be witnesses. Nor removeable Tennents, but Tennents having taks, or Cottars of their Tennents, *de practica*, are still received; because the Law presumes they are not so liable to the Masters impressions; and yet it is generally said in the former Law, of *K. Robert*, *ne aliquis tenens terram de eo adfirmam, vel ad annuum redditum*, and *Farin. doth*, *regulariter*, conclude, that *Colonus non admittitur ad testificandum pro domino suo*; and yet *Glossa ad cap. in literis extra de testibus* adheres to the distinction allowed in our practice, and concludes, that *aut coloni sunt tales quibus imperare potest dominus, & tunc repelluntur, alias non, sed iis tantum* *creditur Farin.* is likewise of opinion, that though Vassals who are not subject to the Jurisdiction of their Superiour, may be received witnesses for him; yet that where his Superior, *habet merum, et mixtum imperium, in vassallos*, the Vassal there cannot be received witness for him, but with us, Vassals of Regalities, are received witnesses for the Lord of Regality, which seems very unjust; seeing as *Farin.* there observes, *Dominus intales vassallos minacem terrorem, et timorem incutere potest.*

IX. Though moveable Tennents cannot be witnesses, yet Cottars may, as the custom now runs, whether they be Cottars to Tennents, who are not receiveable, or not, *II. December 1632.* For our custom thinks Cottars independent; yet I conceive if this were well debated, it would be found that where the Tennent is not receiveable, neither can his Cottars, especially in criminal cases, where exact probation

is requisite; for it is not imaginable, but that the Cottar will stand in awe of him, whom his Master fears.

X. He who was sharer in the committing of the crime, with the person accused, or *socius criminis*, cannot be received a witness, nor yet he, *qui foret consimilem causam*, or who may win, or gain by the event of the pursuit; but in Falshood, *socii criminis*, are received witnesses; because without these, that crime could not be proved; and thus Barclay being accused for forging a Bond, and Disposition, the witnesses who subscribed the same at his desire, without seeing the principal party to whom they are witnesses, subscribe, were received to prove the Falshood, and the forger of the Bond was also admitted.

In the pursuit of Charles Robertson, it was alledged, that *socii criminis* might be witnesses, where the punishment was pecuniary, *et sententia non irrogabat infamiam*; for the reason why *socii criminis* were not admitted, was, because they were infamous, *et inestabiles*; to which it was answered, that the reason was, because they were under fear of the pursuer, and there was greater reason to repel them in small crimes, then in *atrocioribus*; seeing in these lesser crimes, the Commonwealth was not so much concerned, which was the reason why the strictness of probation was relaxed in Treason, &c. And in these the Pannel might be forced to depon; but could not in greater crimes. In respect of which answer, the Justices the 9. of March 1671. would not admit *socios criminis*, though in a Delict, which was only punishable by a pecuniary mulct, and though they were not found to be *socii*, by a sentence, seeing there being *socii*, was offered to be proved by their own Oaths, and by the foresaid Statute, *socius criminis*, and *infamis* are two different objections, which had been unnecessar, if *socius criminis* had been only repelled, because he was *infamis*.

X I. It is ordinary for any person who is pursued for a crime, to raise a reconvention, and to call therein all such as defenders, whom they think may be led as witnesses against them; and it is ordinarily controverted, whether in such mutual pursuits, *scu ante categoris*, may be received as witnesses? To which the solid answer is, that though it seem that they may, because else it should be in the power of the person accused, to set all such witnesses as may be led against him; seeing he may raise a reconvention, or it may be intent the first criminal pursuit, upon design, and call all these as defenders; yet it is thought they cannot be received witnesses, until that Process depending against themselves be first discussed; by the event whereof, it may appear, whether that pursuit be just, or unjust: And by the former Law of *K. Robert*, none can be received witnesses, against whom there is a criminal pursuit intended. Notwithstanding of all which, I have seen the Lords receive witnesses in this case, but *cum nota*.

Witnesses who may be received, are called *testes habiles*, and they are distinguished, *in idoneos*, or sufficient witnesses, or *testes omni exceptione majores*, who deserve yet a further degree of Faith, and against whom there is not only no objection, but even no suspicion, *et testes optima opinionis*, who deserves the highest degree of Trust; Sometimes likewise, witnesses are received, though they be not altogether *habiles*, and these are called with us, *testes cum nota*, who in our Law prove not fully, either the Libel, or defence; albeit by the Civil Law, *testes inhabiles*, were admitted to exculpate, or prove a defence propon'd for the Pannel, if there did not ly presumptions of guilt against them.

X II. If a witness was not *habilis*, to be a witness, when the crime was committed, he will not be admitted to be a witness, though he be *habilis*, & *major*, at the same time of his deposition; because a witness must be such as did then know
what

what was done: thus *Wilson* was repelled, in the Process against *Cask*, the 10. of September 1661.

XIII. It is oft-times controverted with us, if such witnesses as could not be received at the instance of the accuser, may be received at the instance of His Majesties Advocat, which question may be answered by these conclusions, 1. If the objections against the witnesses be such, as make the witnesses *inhables*, as that he is *Minor*, or infamous, then these witnesses cannot be received at the instance of the Fisk. 2. If the objections be such as tend to cast the witnesses, meerly because of his relation to the party wrong'd, as that he is Servant, or within degrees defendant to the party wrong'd, then though the party wrong'd insist not; yet these witnesses cannot be received, if any advantage may accrue to the party wrong'd, by their deposition; except he declare that he shall thereby reap no advantage, and except the crime be such as did no affront to the party injured, for *eo casu*, it is still presum'd, that his relations will retain a privat grudge, or malice, whereupon they may prejudice in their depositions, both the truth, and the defender; and yet ordinarily with us the relations of the persons injured, are received at the instance of the Kings Advocat. Thus *Neilson* was received against *Margaret Wallace*, for Witchcraft, though he was brother in law to *Nicol*, who gave information in the distay, because the Summonds was not raised at his instance, the 20. of March 1622. and yet in that same Process, *Stirling* was not admitted to be an Assizer, because he was brother in law to *Muir*, who was one of these who was alledged to be malificiat by her, albeit the Libel was not raised at the instance of *Muir*, nor none of his relations, which I think both irregular, and dangerous.

Albeit these be relevant objections against witnesses, yet if the proposer of the objection, cite them also at his own instance, *eo ipso*, he acknowledge the witnesses to be, *habiles*

testes, but sometimes he may notwithstanding, propon objections, even against those himself cites, *v. g.* though I cite a man to be witness for me, yet I may set him from being witness for my adversary; because he is brother, or servant.

IV. The objections; *contradicta testium*, are *singulari-ty*, and *contrariety*, and the not giving a sufficient *causa scientia*.

Singularity is, when the witness who depons, hath no concurring witness, and this singularity is divided, *in obstativam, adminiculativam, & diversificativam*.

Singularitas obstativa, is, *in actu non reiterabili*, an instance whereof they give in *Susanna*, and the two Elders, who deponed upon the same Adultery, but differed in the place, and therefore did not prove. And it is a general rule, that where the crime is not reiterable, or reiterated, that two witnesses varying upon the time, or place, as if one should say, a man were murdered at *Edinburgh*, and the other at *Haddington*, these depositions could not be conjoyned, for proving the murder.

Singularitas adminiculativa, is, where the witnesses do not concur in their depositions, yet they are not contrary, and the one assists the other, as in the proving that a Horse was stoln, one should depon that he saw the Thief go in without a Horse, another saw him take the Horse, but no more, which singularity in depositions, doth not hinder the witnesses to prove, neither by our practiques, nor in the opinion of the Doctors.

Singularitas diversificativa, is, when witnesses depon different Acts, as in a crime which is reiterable, and thus the Adultery against *John Maxwell*, was found by the Lords to be sufficiently proved, though one of the witnesses deponed only upon an Adultery committed at one time, and another, of an Adultery committed at another time, *February 1666.* for the

the Lords thought, that if one witness should peep in through a hole, and see Adultery committed, and thereafter another witness should peep in, and see the Adultery likewise committed, yet they were *contestes*, and did prove sufficiently, *etiam ad panam mortis infligendam*, as was found in the probation of Adultery, led against *George Swintoun*; (but in my opinion) this case differs from the former, for in *George Swintoun's* case, both the witnesses concurred in one Act, but they did not so in the case of *John Maxwel*, and therefore, though the depositions were conjoyned against him, by the Lords, for sustaining a Decreet of Divorce; yet it were hard that these different Probations could have been conjoyned, if the case had been criminally pursued, as is clear by *Farin. quest. 64. de oposition. contra exam. testium. num. 55.*

XV. Witnesses who depon things that are contrary, do not prove, if that contrariety be in things that are substantial, but though they differ in some extrinsick circumstances, yet they prove, *& verba sunt improprianda, nnt testes concordentur, & etiam concordari debent aliquando à judice per interpretationem suppletivam*, but though contrariety be a great defect in depositions; yet too formal an agreement amongst the witnesses, who depon all in the very same words, *& per premeditatum sermonem*, is suspect, v. g. If two, or moe witnesses should tell over a long story, in the very same words, as *Farin. well observes, quest. 64. num. 24.*

XVI. Lawyers have taken so great pains, to secure the lives of poor Pannels, that they will not believe witnesses, though concurring, except they can render a sufficient *causa scientie*, if the thing deponed fall under sense, as the seeing a man killed; if it fall not under a sense absolutely, as that a person was drunk, mad, or repute a thief, &c. Betwixt which two, there is likewise this difference, that in these things that fall not under sense, the *ratio scientie* must be given

en, whether it be asked or not, because in effect, it is the *ratio scientiæ*, and not the deposition, which proves in that case.

Witnesses must in our Law be received in presence of the Pannel, and Assize, that the Pannels presence may over-aw the deponer, and that the Assize may judge by the deponers countenance, gestures, and assurance, how far he should be believed, and Advocats are to be present, that they may interrogat upon emergents, and this is much juster, than the Laws of other Nations are, who allow neither Advocat, nor party to be present, whilst the witnesses depons, *Gomes. de delict. cap. 1. num. 65.* And in this also we agree with the Civil Law, *l. Custodias ff. de publ. judiciis.*

XVII. Witnesses are sometimes received, in *criminales*, *ad futuram rei memoriam*, for the defender, but never for the accuser; and that because the accuser may blame himself, for not pursuing sooner, which is not in the defenders power, and *testibus non testimoniis creditur*, whereas depositions, *ad futuram rei memoriam*, are only *testimonia*; And yet with us, the Justices sometimes declare in Court, when they continue dyets, that they will receive the depositions of witnesses, to lie *in retentis*; but this form is not allowable in my opinion, except both parties consent; because by Act of Parliament, all probation should be led in presence of the Assize.

XVIII. It was a defect in our Law, that albeit it allowed the Pannel to object against witnesses; yet it did not allow him to cite witnesses to prove his objections: as for instance, if the pursuer adduced a witness, who was convicted of Theft by a sentence at *Aberdene*, this would be relevant, but the Pannel could not prove his exception, both because the dyet was peremptor, and because he was not allowed to have a diligence

gence for proving thereof; for remedy whereof, by the 11. Article of the Regulations of the Justice-Court, it was appointed, that when the Libel, or Summonds of Exculpation is execute, the names of the inquest, and witness should likewise be given to the defender, to the effect he might know what to object against them, and diligences are thereby allowed him for proving his objections. Against this Article it was murmured, that first this would be very difficult; for the pursuer could not know what witnesses were to be adduced, and much lesse what Assizers might be present, for they could not assure their attendance. 2. This might prove a mean of corrupting witnesses, and Assizers, who if known, might be practised.

But to these it may be answered, that no man should raise a Criminal pursuite to vex men in their fame and fortune, till he were secure that he could prove his Libel, which infers necessarily that he knew the witnesses who were to be adduced. And seeing the pursuer might cite 45. he might be confident fifteen of them would obey, and be so wise as to evite the penalty: And this objection would tend much more against all continuation of Assizers for a whole year, which is very ordinary. To the second it may be answered, that either the witnesses to be adduced, are honest, and then there is no fear of practising, or they are false and obnoxious to corruption, and then they should not be received at all: And it were inhumane that a mans life and fortune should be laid open to the dispositions of these, whom the Law durst not allow to be known, for fear of being brib'd, and corrupted. And this inconvenience could hardly have been evited before thir regulations, for ordinarily the defender knows who were present, and needed suspect that none will be adduced, who were not present. As likewise when dyets are continued (as frequently they were) the witnesses were still known, but these jealousies are

are by very much lesse dangerous, than the inconveniencies which attend the not allowing the Pannel to know what witnesses are suspicious, and should be declined. And our Law should either not have allowed objections against witnesses, or else should have allowed a dyet, and means for proving them: *nam quando aliquid conceditur omnia concedi debent sine quibus ad hoc perueniri nequimus.*

XIX. If witnesses compeared not of old, the dyet was immediately deserted, but now Caption will be direct against them, and the dyet will be continued, for it is unreasonable that the pursuer or Fisk, should be prejudged by the contumacy of the witnesses; but if two compear, it may be doubted if *eo casu*, if the dyet should be continued, for two are sufficient for proving the Libel, but because moe witnesses than two are oftentimes requisite, there being many circumstances to be proved, therefore it seems hard, that the dyet should not be even *eo casu*, continued: And at other times there may be objections which may cast such as are present, and therefore the Justices continued the dyet against *Braco Gordoun*, the 11. of November 1671. Because the defender would not declare that he would use no objections against such as were present.

Though *regulariter* the Justices will grant warrant to apprehend and secure parties who are suspect of crimes, till they find surety, yet they refused to secure or attach, such as were cited to be witnesses, lest thereby they should discourage men from compearing to bear witness, December 1672. In answer to petition given in by the Marquess of Montrose Tenents.

XX. By the custom both of the Council, and Criminal Court, ten witnesses are allowed to be cited upon every separat matter of fact, and Article of the Libel, and no moe, to evite confusion; nor wants there precedents for the number of ten in this case, since *cap. 5. Legis Manimiliae, inquecun rem is qui hac lege judicium dederit testibus publice duntaxat*

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res singulas decem, denunciandi potentatem facito ? and I find in *Valerius probus*, this to be an Article, *edicti pratorii testi- busq; publice dumtaxat decem denunciandi potestatem faciam*, to which number witnesses are stinted, by a Statute of Lewis the 12. of France, *Langlaus. semestr. lib. 3. cap. 5.* from which Statute, our custom seems to have flow'd:

TITLE XXVII.

Of Tortour.

1. *By whom can Torture be inflicted in our Law.*
2. *Torture purges all Presumptions.*
3. *Whether may persons who are condemned, be thereafter Tortured.*
4. *Who are excused from Torture.*
5. *How should such be punished, who Torture unjustly ?*

I. **T**ORTURE is seldom used with us ; because some obstinate perions do oft-times deny truth , whilst others who are frail , and timorous , confess for fear , what is not true : and it is competent to none , but to the Council , or Justices , to use Tortour , in any case , and therefore they found , that Sir William Boll ndene as a Captain , cou'd not Torture , though it was alledg'd , that this was necessar some-

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times; for knowing the motions of the enemy, and might be necessar, and allowed in some cases to Souldiers, for the good of the Common-wealth. And the Council are so ten er in Torture, that though many presumptions were adduced against *Giles Thyre*, *Englisb* man. suspected of Murder, and Adultery, they refused to Torture him; albeit it was prest zealously by His *Majesties* Advocat.

II. It is a brocard amongst the Doctors, that he who offers to abide the Torture, purges all other presumptions, which can be adduc'd against him; and yet *Alexander Kennedy* being pursued for forging some Bonds, and nothing being adduced for proving the crimes, save presumptions, offered to abide the Torture, but this was refused.

Torture likewise being adduced, purges all former presumptions, which preceded the Torture, if the person Tortured, deny what was objected against him; but yet he may be put to the knowledge of an inquest, upon new presumptions, as was found after a learned debate, in the case of *Toshoob*, who was Tortured, for the alledg'd burning the house of *Frendraught*, August 1632. for it was alledg'd, that Torture is intended for bringing the verity to light, and as he had been condemned, if he had contest, so he should be affoilzied when he denies, else no man would endure the Torture, if they were not perswaded, that upon denial, they should be cleared, but would confess, and not endure so much torment unnecessarily; so that the inquisition would be the occasion of much sin, and make men die with a lie in their mouth; and therefore Torture is called, *probatio ultima vid. Clar. quest. 64.* Yet *Spot Maxwell* of *Garrery*, and others were condemned after Torture, upon other probation then was deduc'd before the Torture.

III. I remember it was debated in Council, Anno 1666. If the West-countrie-men who were condemned for Treason, might

might after sentence be Tortured, for clearing who were their complices, and it was found that they could not, *nam post condemnationem, iudices functi sunt officio*; yet all Lawyers are of opinion, that even after sentence, criminals may be Tortured, for knowing who were the complices.

IV. One of the privileges of *Minors*, is, that they cannot be subjected to Torture, lest the tendernefs both of their age, and judgement, make them fail, *ὅτι τῶν τῶν δεκατῆς ἔτων, καὶ ὑπὸ τῆς αἰσχύνης ἀσθενεῖν ἐπιτεταίωται*. *Eclog. de quest. cap. 9. ad, yet l. 15. ff. de quest.* Judges are discharged only to Torture such as are under fourteen; persons very old were not to be Tortured, for the same reason, *l. 3. ff. ad S. C. fillan.* which was by some extended to women, sick persons, and such as had been eminent in any Nation, for Learning, or other Arts, but all this is arbitrary with us.

V. These who Torture, if the person Tortured die, are punishable as murderers, but though they die not, yet by the Civil Law they were punisht, *deportatione in insulam*, or by banishment; and with us they are punisht according to the quality of the crime.

TITLE XXVIII.

Of Remissions.

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1. Whether he who uses a Remission acknowledges the crime.
 2. How Remissions are granted.
 3. For what should no Remissions be granted.
 4. Letters of Slames, and Assithments, when necessary.
 5. Persons condemned, are sometimes restored by way of justice.

WHen the Judges has pronounced his Sentence, he is *functus officio*, and the punishment irrogat by him, can only be remitted by the Prince, though the Council may moderate, or delay it.

The party condemned is restored either by way of grace, or of Justice, restitution *per modum gratia*, is with us called a remission.

I. Remission then is the pardon of the crime, graciously allowed by the Sovereign, and it may be given, either before, or after the Pannel is convicted.

If it be given before conviction, the Pannel by making use of it, doth *per fictionem* acknowledge the guilt, and if he do not acknowledge the same, the Remission is null, and will not stop the execution, as was found in *Alexander Kennedies* case

case, and this is a received maxime with us, yet *ex sententia Doctorum*, non videtur fateri crimen, qui gratia utitur, Alexander. consil. 70. Bossius de remed. ex clem. num. 29. nec potest iudex dicere ei, qui vult eausi oportet fatearis delictum, alias non uteris; yet Bossius tells us, that by the custom of Milan, he who uses a Remission, must acknowledge the crime, *ibid.* but our Law in its foresaid maxim may be reconciled with these Doctors, for even with us, the taking a remission doth not prove the crime, since that may be done sometime, rather upon the accompt of security, then guilt, & licet se redimere à lite; and therefore Braids escheat, as an adulterer, was not declared, *January 1662.* by the Lords of Session, there being no probation of the Adultery, but the Adulterers taking a remission; but the using a remission doth certainly prove, as was formerly observed from these Statutes.

This Remission is granted by a signatur under his Majesties hand, and is presented in Exchequer, which is equivalent with us, to that *iterinatio* mentioned by *Perez. ad tit. de sent. passis num 16. Clarus. de fin. quest. 59. Num. 10. qua est approbatio senatus, qua in causa cognitione versatur ne impetrentur gratia per obreptionem, vel subreptionem*; and therefore if the Remission be granted upon a misrepresentation, the Council will upon a Bill stop the same, till his Majestis further pleasure be known, as they did in *Murray of Burghoun's* case: and though by the 13. *Act. 10. Par. F. 6.* The writer of such signators, should subscribe his name upon the back of the signator, to the end, that he may be answerable, if it contain any thing that is unlawful; yet the said remission granted to *Burghoun*, was sustained, though it had not been so subscribed, when it past his Majesties hand, yet being alledged to be in desuetud, but rather because the writer did thereafter subscribe, *Jan. 1666.* and these remissions are ordained to pass the great Seal, of design that the Seal should be a check upon them, but if they passe

pasſe the Seal, they cannot be recalled, *tanquam ſurreptitia*. Boſſ. *ibid.* num. 36. for, ſayes he, they are ordained to be preſented, *in ſenatu, ne ſint ſurreptitia, & ut inquiratur*: And therefore it is appointed by the fourth *F. 4. Par. 6. c. 62.* that the Remiſſion ſhould contain the greateſt crime for which the Remiſſion is craved, and if the greateſt crime be not expreſt, the general claule remitting all crimes, will not defend againſt a purſuit for any crime that is greater then the crimes ſpecified in the Remiſſion ſuitable to which Lawyers aſſert, that *qui petit gratiam, debet non ſolum delictum exprimere, ſed & qualitates ejus, aliter uti ſurreptitia, nihil valet, ſed non debet exprimere omnia delicta ſeparata* Boſſ. *ibid.* num. 33.

III. Remiſſions ſhould not be granted for Slaughtering committed premeditarily, or by Fore-thought-fellony, *Stat. Dav. 2. cap. 50.* where it is ordained, that no Remiſſion ſhall be granted for homicide, till inquisition be firſt made, whether the Slaughtering was committed by fore-thought-fellony, and if it was ſo committed, the Remiſſion ſhall be null, *& hoc conceſſit rex*, as the Text ſayes, This is confirmed by *K. Ja 4. P. 6. c. 63.* which Act is declared to endure, till his Maſteſty recal the ſame, and yet it is repute a temporary Act, and notwithstanding thereof, remiſſions are ordinarily paſt for murder, as in the Earle of Gaithneſſes remiſſion 1668. againſt which, this was objected; but repelled. Yet in *Flanders*, and other places, this Law is ſtill in force.

No Remiſſions ſhould be granted for burning of corns in ſtacks, or barns, *Act. 18. P. 7. l. 5.* Which Act is not temporary, and yet is not obſerved, as was found in the foreſaid remiſſion. All Remiſſions ſhould be compoſed, and ſubſcribed by the Theſaurer, Regiſtrat in his Books, *F. 6. P. 13. c. 169.* Albeit his Maſteſty may remit what injury is committed againſt him yet he cannot prejudice thereby the intereſt of third Parties. This ſatiſfaction is by the *Civilians* called *reparatio damnorum*, by us an Affiſhment, and the obtainer of the remiſſion

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mission, must find caution to refund the party injured, of all his damage and interest, within forty dayes after he produces his Remission, else his Remission is null, *Act* 75. P. 14. *f. 2. Act* 136. P. 8. *f. 6. & Act* 154. P. 12. *f. 6.* but these *Acts* are only temporary. But by the *Act* 174. P. 13. *f. 6.* Remissions granted to any persons, passing to the hon, for Theft, Rief, Slaughter, Burning, or Heirship; are declared null; if the party lased, be not first satisfied: and albeit it would seem by this *Act*, that Assishment subsequent to the remission, is not sufficient; yet the meaning of the *Act* is, that the Remission shall be of no avail, till the party lased be satisfied.

Notwithstanding of these *Acts*, it is *de practica* very dangerous to challenge a Remission, and I am informed, that one of the learnedest Lawyers of his time, was sent to the Castle for quarrelling the Kings power, in granting a remission for fire-raising; yet I find a Remission produced by *John Bell*, quarelled as null, because 1. It was given for murdering *Cristopher Irving*, and so is null by the foresaid *Act*. 2. The remission should contain the greatest crime, and Slaughter is not so great a crime as murder, Nor was the quality of fore-thought-fellony exprest. 3. It was not subscribed by the Thesaurer. The Justices delayed to give answer, but I find not the person was punished, 1643. As also *Mackie* being convict for falsit, and having enacted himself never to return under pain of death; thereafter he returned, and being putted for his life, alledged upon a Remission. To which it was answered, that the remission was null; because he returned before it was obtained, and past the seals, no was it yet past. Upon which the dyer was continued, the 23. of *Febr.* 1622. But it is observable, that the put was here at the Advocats instance only, who could not quarell his Majesties remission upon no account.

IV. If the party doth willingly grant a discharge of all grudge,

grudge, or revenge, in the crime of murder, this discharge is called a letter of Blanes, and is called by the Doctors, *littera pacis*; and thus, *Plot. consil. 78.* sayes, that *gratias acta parti nocenti à principe non valet, nisi fiat reparatio damnorum, & interesse, vel nisi pax sit prius habita, ab heredibus offensi.*

This rule hath some exceptions, both by the Common Law, and by ours, for by ours, exception is made of remissions granted for pacifying the Highlands, and Borders, which are valid, though the party laded be not satisfied. *Act 174. P. 13. f. 6.* Which is introduced in favours of the publick quiet, and is founded upon the same reason, from which acts of indemnity are granted, without gratifying, or repairing these who were ruined by the persons indemnified. And for that reason also, *rex potest gratiari nocentem, sine pace privati interesse habenti; quando damnandus laborasset pro bono reipublice & fecisset illud, per quod multorum salus causata esset. l. non omnes. S. fin. ff. de re militari.* By thir Remissions, the party is not restored to his good fame, *l. 3. C. de gen. abolit indulgentia patres conscripti quos liberat, notat, nec infamiam criminis tollit, sed pena gratiam facit.* And though I think this should hold in such as are remitted, after they are condemned, because they are known to have diffamed themselves, by contracting that Criminal guilt; yet it should not hold in such, as secure only their own innocence by a remission, and redeem themselves rather from hazards, then from guilt.

V. The Kings Majesty sometimes restores the person condemned, by way of Justice, *per viam justitiae*, which he doth by rescinding the sentence, that stands against him as unjust; and this is done, either in Parliament, if the person was condemned by them, or by a review, in the Justice Court, if he was condemned there; and in this case the party is restored, not only to his Fame, but likewise to all his Estate, even

even though it was bestowed upon a third party, as was after much debate, found by the Parliament, 1661. in the case betwixt the Marquiss of *Montrose*, and the Marquiss of *Argyle*.

TITLE XXIX.

Of Prescription in Crimes.

1. *How crimes did prescribe by the Civil Law.*
2. *Whether do crimes prescribe by our Law.*

I. According to the Civil Law, crimes did prescribe in twenty years, *L. querela. C. de fals.* And *Clarus* doth assert, that generally all the Doctors are of opinion, that all criminal pursuits prescribe in that time, but this prescription did not run in some atrocious crimes, such as Sodomy, Parricide, Apostacy, &c. Wherein they erre, for where the Law sayes, that either *semper paricidii accusatio permittitur*, as *l. ult. ff. de leg. Pompei. ad paricid.* or that *nullus temporibus arcetur apostatarum accusatio*, that must be interpret, *de prescriptione viginti annorum*, which is in Law, called *longis-*

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sum tempus ; but the crimes of Adultery, and *peculatus* , prescribe in five years.

I I. It may be doubted with us , if prescription has place at all ; and that it has not , may be urged from these grounds ,
 1. That prescription has no place with us , except where it is warranted by a particular Statute , and there is no Statute warranting prescription in criminals. And if prescriptions founded upon the Civil Law, had been sufficient in *Scotland* , there needed not any particular Acts to have been made in civil cases ; but since our Law thought necessary , to make Laws as to prescriptions in civil causes , they had much more determined this point , by Law in criminal cases , if they had thought it fit to extinguish crimes by prescription : but on the contrair , our Act of prescription in heritage , 1617. hath excepted the crime of Falshood from prescription. 2. There being *jus quasi* to the King , by the committing of the crime , both *quoad vindictam* , *et bonafisco applicanda* , that Right cannot be taken away from him , but by a publick Law , or His own privat Remission. 3. It seems unreasonable , that because a privat party will not inform , being either affraid , or negligent , that the publick should therefore suffer. 4. There is no instance in all our Practiques , where prescription hath been sustained ; but one the contrair , crimes of an old date , even after fourty years , have been punished. 5. *Semel malus , semper presumitur esse malus in eodem genere malitia* ; and therefore it is unjust , to suffer a person to live in the Commonwealth ; who will be both doing wrong himself , and inciting others to do so , by his example. Yet for the other part , it may be urg'd , 1. That the only end of punishment , is , that the crime committed , may be punished , to preven the error of others ; but so it is , that after a long time , both the publick is presumed to have forgot , that any such crime was committed , and the parties injured , or presumed to have forgot , and remitted their privat revenge , for satysfying whereot , punishments

nishments are inflicted. 2. After so long a time, any probation that could be led, against the Malefactor, either fails, or the witnesses after so long a time, may have forgot the exact circumstances; and it were very hard upon testimonies, that have so unclear a *causa scientia*, as these witnesses can give, to take away a mans life. Likeas, the witnesses, and other probation will probably perish, whereby the defender might have exculpat himself, and maintained his innocenc; so that the Fisk, or any privat party, may by their negligence, or upon design, prejudge the Pannel of his defences, against the common rules of the Law, whereby mens negligence can only wrong themselves, and they have only themselves to blame, that did not make use sooner of the remedy appointed by the Law, for satisfying either publick, or privat revenge. 3. Since our Law doth punish Perjury, and poiding of Oxen, Usury, *Stellionatus*, and others; according to the Civil Law, it seems to be most agreeable to reason, that as these crimes are punished, according to the Civil Law, so they should be extinguished by the Civil Law, *nam nihil est tam naturale, quam unumquodq; eo modo dissolvi, quo colligatum est, & quem sequitur incommodum animi sequi debent commoda*: And the Act 1617. did introduce prescription with us, as the Act it self bears, because it was allowed by the Civil Law, and the Laws of other Nations. 4. It were absurd, that in the case of Treason, which may be inquired into after the defenders death, there should be no period of time, whereby Families might be secure; and that it should be lawful, after two, or three hundred yeares, to vex Families, of great Honour, and Interest, upon pretext of crimes committed by their Predecessors. 5. This prescription is very justly introduced, to punish the negligence of such, as will not pursue crimes; and it is most presumeable, that if they pursue, after they have delayed for so long a time, that any pursuit thereafter intended, is rather intended upon some superveni-

ent quarrel, and picque, then upon the account of the crime. 6. The fear of punishment, and conscience of the guilt, for so long a time, is in it self a sufficient punishment; And so God Almighty himself thought in the case of *Cain*; and therefore to punish after so long a time, were to punish twice. By our Law, recent crimes are more severely punished than others; as murder with red hand, and the thief taken with the fang, and by how much the crime grows older, by so much it should be the less punished. 7. The necessity of example, which is the reason inductive of punishment, fails in old crimes, so the punishment should then also be remitted, as unnecessary.

To the contrary arguments, it may be answered, to the first, that our criminal law, being much more founded upon the Civil Law, then any other part of our Law is (as shall be clearly proved) there needed no particular statute in this case with us, especially seeing this prescription of twenty years in crimes, has in effect become the Law of Nations, and several other Nations, who have many Statutes in other cases, have yet allowed of this prescription without any particular Statute. 2. There seems to be greater reason, that an Act should have been necessary for prescription, *in civilibus*, then in crimes, because in civil cases, the *Roman* Law was very various, and *quoad* the particular periods of time was altered by all Nations, according to the particular state of their affairs; but in criminals, their prescription was exactly observed, by all Nations, and was very reasonable; and there being expressly, *jus quasi in civilibus*, to every privat person, it was necessary that should have been taken away by an expresse Statute; but it is not so in crimes, where in effect. At first there was no express, *jus quasi*, either to the King, or any privat party, but only *à potestas acquirendi*; for the *jus quasi*, is only by the sentence, for before sentence, the Fisk could not dispon upon; and so had no right to the

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the Malefactor's goods, and this answers likewise the second reason.

To the second, third, fourth, and fifth, it is answered, that doubtless, the wise *ROMANS*, and other Nations, could not but have these inconveniencies under consideration, when they introduced the foresaid prescription in crimes; and to the third, it is particularly answered, that if privat parties will not pursue their revenge, they justly lose the capacity by their negligence, and His *Majesty* having so many sworn Officers, in every corner of the Land, it is not presumeable, that any inconvenience will arise through want of information, but if there do, it is much more reasonable, that these negligent Judges should be punished, especially seeing there are express Laws, appointing negligent Officers, in such cases, to be punished. To the fourth, it is answered, that negative Arguments, brought from the not being of a Law, or a custome, is not concluding, for as in many other cases, so this might have been argued, as strongly as here against His *Majesties* Advocat, when he of old crav'd, that the Heirs of Traitors might be forefaulted, for their Predecessors guilt. And when he of late crav'd, that probation might be led against Traitors in absence; in either of which cases, there was neither Act, nor Practique; nor could any thing have been alledged, but the Authority of the Civil Law, and the consent of other Nations. To the fifth, the crime being taken away by so long a time, it were unjust to take away a mans life, upon the former prescriptions; and the fear of punishment, is a sufficient punishment, for all the malice arising from that prescription: neither is it presumed, but that if a Malefactor continue to be ill, he will be pursued within twenty years, and if he did for twenty years live so soberly, and discreetly, as that the Law thought not fit to take notice of his former crime, there is little hazard of any future malice.

And to this opinion I rather encline, because *Carpozov*. relates,

lates, that albeit by the Statutes of *Saxonia*, prescription is only introduced by expresse Statute, in moveables, and heritages, and that there is no expresse Statute, as to prescription in criminals, yet these prescribe also in twenty years; because that prescription introduced by the Civil Law, is not expressly abrogated amongst them, *nam non presumendum est totam prescriptionum observationem tantis vigilis excogitam, Saxonia legislatorem evertere voluisse, ut in simili casu dicit Imperator. l. 34. C. de in offic. test. & Petr. Heig. part. 1. quest. 26. num. 47. vid. Carpzov part. 3. quest. 141.*

TITLE XXX.

Of Punishments, *de penis.*

1. *The design of punishment.*
2. *Whether crucifying, or banishment, be lawful punishments.*
3. *Whether a man can bind himself under the pain of death.*
4. *Whether arbitrary punishment can extend to death.*
5. *The loss of life is still followed by loss of moveables.*

How

6. *How far can ignorance, anger, drunkenness, or command, either excuse from punishments, or lessen them.*
7. *How far doth Nobility, or great Merit, excuse, or mitigate punishments.*
8. *How far doth the inconsiderableness of the transgression mitigate, or lessen the punishment.*

I. **P**unishments are inflicted, not only to satisfy, either the publick revenge of the Law, or the privat revenge of the party, but rather to deter others for the future; and yet they are rather inflicted upon either of these designs, then to punish the offender, and make him insensible, for what is done can no more be helped.

Some crimes are so horrid, and so unknown to the world, that it is not fit the Malefactor should be punisht publickly: thus some crimes have been tryed in *Scotland*, at midnight, and the Malefactor immediatly drowned in the *North-loch*, without inserting any part of the Process in the Journal Books, wherein also I found, that Malefactors were ordain'd to be execute very early in the morning, for bestiality, which was occasioned by the confession of one, who asserted, that the reason of his committing that crime, was a curiosity he contracted at his seeing one execute for it. And in such crimes no man needs to be deter'd, nor will terror restrain him, whom nature cannot. Since then executions for some crimes, incite some to curiosity, and vex others with horror, and are necessary to none, some may be more properly punished privately, then publickly, and thus such persons as are popular, and are execute only for crimes, for which the people have a kindness, will be more happily execute privitly, then publickly, because the persons executed, are by publick executions obliged to die rebelliously, and the people are confirm-

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ed in their good opinion of them , by their courage at death.

I I. *Constantine* did forbid, that any Malefactor should be crucified, and this he did, because of his respect to the Cross; he likewise did forbid, to stigmatize the face, l. 17. C. de pænis, because the face is Gods Image.

Martyrus was of opinion, that banishment was not lawful, lest the person so punished, should be forced to live amongst Turks, and others, by whom he might become more flagitious, then formerly; and I have oft thought it inhumane, to send our Malefactors to our neighbours, and imprudent, because it will occasion the sending of theirs from home, whereby we may be likewise troubled with such as they have banished: and it is probable, that Correction-houses would be both safer, and more advantagious, for in these they may serve the publick, whom they have offended; but with us, no Judge can confine a man, whom he banisheth to any place without his Jurisdiction, because he hath no Jurisdiction over other Countreys, and so cannot make any Acts, nor pronounce any sentences relative to them.

Torturing punishments at death, are also very inexcusable, for they oft-times occasion blasphemies in the dying Malefactor, and so damn both soul and body, whereas the soul should be allowed to leave quietly this Earth, and go in peace to the Region of Peace; nor doth these terrifie others from the like offences, for these who fear not death, will fear nothing.

I I I. It was a rule amongst the *Civilians*, that no man could oblige himself to any thing under a corporal pain, *quia nemo est dominus suorum membrorum*. But with us, it is most ordinary for a man who is guilty of a crime, to oblige himself never to return to *Scotland*, under the pain of death; thus *Hamiltoun* was hang'd, Anno 1649. for returning to *Scotland* after she had enacted her self, never to return under pain

of death, and her ditray was only founded upon that contravention; and certainly, contempt being added to the former guilt, may make a crime that was not capital, become so: and this contravention implies in effect, *panam effracti carceris*, which is oft-times capital; so that though a person cannot bind himself, when he is guilty of no crime, to perform any thing under pain of life, or limb; yet if he be guilty of a crime, he may consent, and enact himself, as said is.

IV. Whether when Law allows a Judge an arbitrary power in punishing; that Judge may inflict death, in that case is much contraverted: *Chassan.* and *Socin.* think that he cannot, and this seems clear, 1. 4. *qui vexant annonam debent puniri extra ordinem non tamen anima amissione Inst. de publ. ind.* And *Pappon.* relates, a Decision of the Parliament of *Paris*, finding that it could not. 2. This would make Judges very arbitrary, and render the Lives, and Fortouns of the Leidges very unsecure. 3. Seeing Lawyers are of opinion, that no mans life can be taken away without an expresse Law, it seems very consequential to this; that no mans life can be taken away upon so general a Law. 4. By the 20. *Act Parl. 1. Sess. 1. Ch. 2.* death, and arbitrary punishment are opposed: For these who haveing past sixteen years of age, bear, or curse parents, are ordained to die, but if they be within sixteen, and past pupilarity, they are ordained to be arbitrarily punished. Whereas, if arbitrary punishment might be extended to death, this difference would be ineffectual, and the Law thereby evacuat. And by the 5. *Act 1. Parl. 7a. 6.* the punishment of saying, and hearing Messe, is elcheating of their goods, and an arbitrary punishment of their persons, for the first fault, banishment for the second, and death for the third; so that arbitrary punishments is lookt upon, as lesse then death, else the first fault should be as severly punished as the third, against both the principals of reason, and the design of the Law-giver. 5. Arbitrary punishment is appointed

ed ordinarily for so mean, and inconsiderable faults, that it were inhumane to think, that these could be extended to death: *Skeen* also, *de verb. sig. verb. iter.* sayes, that if the Pannel come in will, it is lawfull for the Justice to fine him, according to his offence, but he speakes not there of his power to infl. & death, *eo casu*; and yet *Skeen ad cap. 6. l. Malcolimbi. vers. 2.* Wherein it is stature, that the Marischal, and Constable shall punish offenders, according to the quality of the offence, observes, that *puna extraordinaria*, may be sometimes extended to death; because of the aggraving circumstances, and cites for this, *l. ult. ff. de priv. delict. & 16. de panis*, but these Laws are ill cited, as will appear by reading them. When the pain is by Law, or custome arbitrary, and the defender comes in will, he must presently find caution to satisfie the Kings will, betwixt and such a day, this is the constant custome, and was practized the 22. of November 1600. *Advocatus contra Patrick Mc. creif*, and others, but where the crime is punishable by an expresse, and determinat punishment there, though a defender come in will, it ought not to be received, and thus the Marquise of *Argile* being pursued before the Parliament for Treason, offered to come in will, but his submission was not accepted.

V. It is uncontraverted with us, if when any crime is punishable by death, the Moveables falls to the King, though the Act bear not, that the crime shall be punishable by death, and confiscation of Moveables; and according to the Civil Law, *proscriptus eratis cujus bona expressim confiscabantur, damnatus vero cujus bona tacite, publicatio enim bonorum sequebatur tacite panam capitalem*, *Matheus cap. 2. de Sicariis, num. 2.* And albeit the Judge should omit in his Sentence, the punishment due by Law; yet *ipso jure*, there is by the damnation, *jus questum fisco*, as was found after a large debate, in the case of *Wauch*, who being a landed man, found guilty of Theft, though he was only fined by the Sheriff in a thousand Pounds, yet

yet the Donator to the Escheat was found to have right to all the Estate, and that without any new sentence, which is conform to *l. 1. & 2. ff. de bon. damnat. & l. 2. C. de bon. proscip.* But it seems hard, that confiscation of Moveables, should still follow upon all crimes, though the Law expresse not that way of punishment, seeing this is to punish the Children, and not the committers only, and since this having been only invented by *Julius Caesar*, as *Suet.* observes, *Justinian* did hereafter by his *Novel. 117. cap. 5.* appoint that the offenders Goods should only be confiscated in Treason, for that crime taints the Blood; nor have we any Law with us, appointing confiscation in all capital cases: *Liv.* tells us, that this seem'd barbarous in the *Roman decemviri, lib. 3.* and *Herodot.* assures us, that even the *Persians* would not confiscate the offenders Estate, in the Crime of Treason, *lib. 3.* Nor would the *Emperor Aurelian*, allow it, lest it should be thought, that he pursued rich Malefactors, meerly for their Estates, and really some Judges are to be jealous'd upon that account. But though mens escheat should not fall without express Law, yet custom hath supplied Law with us in this.

Since a person who is interdicted cannot, dispoſe upon his Moveables, the question is, if they can fall under his Escheat, or if he can prejudice himself by his confession, for *tantum facit quis de linquendo quantum facere potest contrahendo*; And theretore since he cannot alienate them by contracting, so neither should he be able to alienate them by delinquency, especially if the interdiction be judicial, by the authority of a Judge, and founded upon the persons being prodigus, or of a weak judgement: the like may also be doubted, in the case of one who is Proprietor of Lands by a Tailzie, bearing a Clause, *de non alienando, irritanter, & resolutive concepta*, who may evacuate the Tailzie, if it may be forfeited upon his delinquency; As to the first of which cases, Lawyers are of opinion, that since Prodigals are esteemed as Pupils,

that therefore their Goods cannot be confiscated upon any confession emitted by them, without the consent of these to whom they are interdicted. *Cabal. Cas. 48. Bald. ad l. 1. C. de confess.* But they think that if the crime be proved against them, then their Goods may be confiscated, for this priviledge of interdiction being introduced in their favours, ought not to be advantageous to them, in defending them against guilt, *Cassens. ad l. etiam. ff. Solut. matr.* And with us, since interdiction cannot defend against Captions, much less ought it to defend against crimes. As to the second question, it is clear, that such Tailzies, however conceived, cannot defend against forfeiture, for it is not in any Subjects power to secure his own Estate against crimes; and if this could hold, then no mans Estate should ever forfeit, for all men would adject such conditions; and this would invite them to commit crimes, whereas the Law endeavours by all means to deter them.

Because many of our Laws appoint crimes to be punished, according to the prescript of the Civil, and Common Law, as Falshood, Perjury, &c. And that many punishments there used, are now in desuetude: therefore it is fit to know, that in place of *damnatio ad bestias*, succeeds heading, or decollation; in place of *damnatio ad metallum*, Succeeded the Gallies in France, and the Correction-house with us, *Deportatio* with them, is banishment with us; and *relegatio* with them, is confinement with us.

When two Laws inflict different punishments, upon the same crime, how far the one innovats the other, I have debated fully, *Tit. De forcement.*

Pana sunt temperanda (punishments are moderated) in the opinion of Lawyers in these cases.

VI. Ignorance, which excuses none, if it be of the Law of Nature, but ignorance of the meer positive Law, excuses in some cases, Women, Peasants, or Bours, *rustici quando agitur*

agitur de dolo presunto secus vero ubi agitur de dolo vero, nec excusantur ubi clam deli querunt. Ignorance also, in matter of fact, excuses persons, though judicious, if they followed the faith of such as understood, *si crediderunt viro fide digno*, as Counsellors, Lawyers, &c.

2. Just anger, and grief lessens the punishment, *sive proveniat ex facto adversarii, sive tertii, licet hoc non sit sine scrupulo Farin. quest. 91.* But I think that it should only lessen the punishment in arbitrary cases, but not in statutory punishments.

3. Youth, and great age, sometimes excuse, but of these formerly, *Part. 1. Tit. 1.*

4. A man who is drunk, if he used not to be so, is somewhat excused, and is not punished for having committed the crime (seeing it is presumed, he understood not what he was doing, because he was drunk) but if the defender fell drunk upon design, or gloried in having committed the crime, he is not thereby excused. Love also excuses in what is done, *ex subito & improvise amoris impetu, secus si premeditate*, but even in the first case it only mitigates the punishment.

5. The custome of the place excuses, or at least lessens the punishment, when the crime is not committed against the Law of God, or Nature, for Laws *abeundo in desuetudinem fiunt non leges, & non est in ma'a fide, qui facit, quod omnes faciunt.* But this was repelled in the Marquis of Argiles case; who alledged, that he complied only with the usurpers, in the same manner, that all the Nation complied, and yet the Council ordinarily admit this, to defend Highlanders, when they are cited for travelling with Guns, and other Arms, because it is the custome of their Countrey. And I think this may be alledged, to defend such as are accused for Witchcraft, in consulting such as can tell where they may find what they lost, or was stolen from them, but not from all punishments.

6. The command of a Superiour or such as a master excuses his servant, as has been said in the Title of Theft, and of a Magistrat excuses Burgesles in Insurrections, hath been observed in the Title Sedition, and Messengers in executing Decrets, as hath been observed in the Title Detorcement, a son also is to be excused if he obey his father, & in atrocioribus à pana ordinaria & omnino in levioribus, as is observed in the Title Art and part.

7. Noblemen should get some allowance during the dependance of the process, and are never to be sent to correction houses, Pillories, &c. and as in no crime they were punished by the Civil Law, till the prince was first consulted (which we observe not) so if they commit a delict, or lesser Crime, unnecessary defence of their honour they are to be excused à pana ordinaria, and generally, the Doctors think, that where others should only be banished, except when by their crime, they have forfeited the Title of Nobility, as in betraying the Countrey, in stealing, &c. For in these cases, they are to be more severely punished than others.

8. Great merit, and skiltulness, excuses some crimes, and good successe is also an ordinary defence, as if a Souldier who disobeyed order, should beat the enemy by that disobedience.

9. These who are pursued at the Kings instance, for crimes committed in another Countrey are to be more gently punished, because the scandal was not given there, and so the offence was lesse in that countrey, and some Lawyers are of opinion, that the punishment should be still lesse, where the privat party injured insists not, Cod. fab. tit. de panis def. 22. and because the scandal grows weaker, as it grows old, therefore after long silence, the punishment is to be moderated, *αὐτὸν δὲ οὐκ ἔστιν ἐν τῷ ἐυλαμπῆναι. l. 25. ff. h. t.*

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can neither augment, nor lessen it, else to what purpose should the Law specific punishments in some Statutes, and allow the Justices an arbitrariness in others. *l. 244. ff. de verb. sig. mul. & potestas judicis est quantum dicat, sed hoc ita verum, si non lege sit constitutum, quantum dicat*, and since men are punished because they transgress the Law, therefore they should only be punished according to the Law, and the due observance of this, will keep Judges from being arbitrary, and the Liedges from being oppressed,

VIII. Whether the meanness of the Transgression, should defend against punishment, or should only mitigate the punishment, seems to be dubious; because of the undigested discourses, of such as treat that subject; yet I think they may be solidly reduced to these three conclusions, 1. That where there appears to have been *dole*, or contrivance in the committer, there the smallness of the transgression, doth only lessen the punishment, if it be arbitrary by the Law, as for instance, if a man should paction for sex Shilling, and two pence *per cent*, where the Law allows only five Shilling, *per cent* though the Sum lent, were very inconsiderable, and the excels be there very Small; yet it should infer Usury; because a clear design of offending the Law, did there appear, by the expresse paction: and in such cases our Judges find the Libel relevant, but reserve to themselves the consideration of the Smallness of the excels, when they shall come to tax the punishment.

2. If the punishment be severe, and that it cannot be remitted by the Judge, As if the Law appoint Theft to be punishable by death, it were unjust that an inditement of Theft, should be found relevant for stealing two pence.

3. If it appear by the meanness that there was no design of transgression, and that the Comitter designed not for so small a matter to commit a crime, in that case, the meanness of the transgression ought to defend against the relevancy; For as Lawyers have well observed, *minimum non attenditur in delictis dolosis Craver. Consil.*

Confil. 46. nec praesumitur. Cardinalis Simoniam commississe pro re minima. siquestio est de simonia. And to these cases only, doth that Law extend, *de minimis non curat praetor. l. scio ff. de in integrum restit.* And therefore if a person should be endited for committing Usury, in so far as he took Annualrent before the Term, if the excess were small, because the Annualrent was very inconsiderable, and was taken, but a Moneth or so, before the Term of payment, the Libel should not be sustained against him; for it is not presumeable, that he took that Annualrent out of avarice, but negligently, looking upon it as no breach of the Law; or upon some other innocent accompt, as because the Debitor and he were to fit other accompts, or the Debitor was to go out of the Countrey, and thus the Council decided in the case of *Purves Anno. 1666.*

Where the punishment is arbitrary of its own nature, the Council may moderate the punishment determined by the Justices. 2. Where the punishment is statutory, and determined by a special Law, as in Treason, &c. it may be argued, that there the Council can no more mitigate, then they can remit. 3. Though custom be equivalent to statute in other cases, yet in cases where the punishment depends upon custom, as theft, I have often seen the Council alter the punishment from death to banishment: But it were surer, that even in this last, the mitigation were procur'd betwixt the reading of the verdict, and the pronouncing of doom; for after doom, *ius est quaesitum Regi*, as to all the Moveables, and life.

TITLE XXXI.

Of Criminal Sentences, and
their Executions.

1. *The form of a criminal sentence with us, and how it is pronounced.*
2. *The debate is not insert in the Sentence.*
3. *Whether the Sentence be null, in totum, if the Judge punish in lesse, then the Law allowes.*
4. *Whether Criminal Sentences may be pronounced in the night time.*
5. *Whether the verdict of an Assize, be necessary in all cases with us.*
6. *Within what time should a Criminal Sentence be put to execution*
7. *Whether Magistrats may force men to be executioners.*
8. *How absents are to be proceeded against, and when Letters of Intercommuning, and Commissions of fire and Sword are granted.*
9. *Whether doth all punishment cease, by the death of the party.*
10. *If a criminal Judge may retract his own sentence.*

1. **A**fter Probation is led, the Assize is inclosed, who return their opinion, which may be called their sentence, and this sentence is called a verdict, or *verdictum*, nam
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sententia pro veritate habetur, but that which is properly the sentence in a criminal Cause, is that deliverance of the Judge, whereby the Pannel is condemned, and punish'd, or absolv'd from all punishment: and this Sentence is in criminals, by our stile, call'd an Act of conviction, or an Act of absolution: But *acta*, in the stile of Lawyers, expresses only the middle Acts of the Process, *acta judicilia*, but not the Sentence. Sometimes likewise the criminal sentence is in our Law called a doom, especially in forfeiture; yet to speak strictly, these two differ, for that part of the sentence, which finds the Pannel guilty, or innocent, is called the Act of conviction, or absolution; but that part of it, which interrogates the punishment, is called the doom; and these two are sometimes separate, which falls out when a long time intervenes, betwixt the finding a person guilty, and the pronouncing of his punishment: but ordinarily they are conjoyned. All which will appear more clearly, by the several forms here exprest.

An Act of Conviction, and Doom, *Curia*, &c.

THe which day being entered upon Pannel, dilated, accused, and pursued, be vertue of Our Sovereign Lords Letters, raised at the instance of A and B, Advocat to Our Sovereign Lord, for His Highness interest, who appeared personally, to pursue them for the crimes following; that is to say, for so much, as be divers Acts of Parliament as in the said dittay at more length is contained, after reading of the whilk dittay, and divers alledgeances proponed be the Pannel, and their Procurators, and writes produced for instructing there-
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of, that the said matter should not passe to the knowledge of an Assize, and answers made thereto, be Our Sovereign Lords Advocat, and writes produced be him, for veriffing thereof. The Justice and the dittay relevant, and did put the samen to the know'edge of an Assize, of persons following they are to say, whilks persons of Assize being chosen, sworn, and admitted, and the said being accused of the dittay of the crimes above-written, which were verified be their own depositions, and confession in Judgement, they removed altogether furth of Court, to the Assize house, where they be plurality of vots, elected, and chose the said C. reasoned, and voted upon the points of the said dittay, and being ripely, and at length advised therewith, together with the depositions and other writes produced be His Majesties Advocat, for the verification thereof, entered again in Court, where they all with one vot, be the report of the said Chancellour, fand, pronounced, and declared the said D. to be filed, culpable, and convict of the crimes respective, above-written, contained in their said dittay, for the whilks cause, the Justice be the mouth of dempster of Court, discern'd, ordain'd, and adjudg'd the said to be taken to the Castle-hill of Edimburgh, or Mercat Crosse, and there to be hanged till he be dead, and his hail moveable goods to be escheat to His Majesti's use, or their heads to be stricken from their bodies, and the said to be taken to the Mercat Crosse of Edimburgh, and here his Tongue to be pierced with an hot botkin, and thereafter banisht this Realm, not to be found therein, til under the pain of death: Or to be scourged, and all their moveable-goods to be escheat, which was pronounced for doom, extracted.

A& of Conviction.

THe whilk day entered upon Pannel, dilated, accused, and pursued be be vertue of Crimes purchast be him, against them, of Art, and Part of demembring of of the midle finger of his left hand, nearest his little finger, committed the day of upon the Street of which was put to the knowledge of an Assize, of the persons following, they are to say whilks persons of Assize, being chosen, sworn, and admitted, after accusation of the A. of the crimes foresaid removed altogether furth of Court, to the Assize house, where they be plurality of wots, elected and choosed the said in Chancellour, reasoned, and voted upon the points of the said dittay, above-specified, and being advised, re-entered again in Court, where they all in voice, be the mouth of the said Chancellour, fand, pronounced, and declared the said to be filed, culpable, and convict of Art, and Part of demembring the said. of his midle finger, nearest his little finger, of his left hand, committed the time foresaid, whereupon the said asked Instruments, Extractum, &c.

Doom for Demembring.

THe whilk day, &c. being entered on Pannel, to hear doom pronounced against them, as they that were convict be an Assize, in a Court of Justiciar, holden within the Tolbooth of Edinburgh, the day of instant, for Art, and Part of he demembration of ut supra, the Justices be mouth of decempler, decerned, and ordained the said to content, and pay

pay to the sum of three hundred Merks, in full satisfaction, and assithment, of the demembration of him of the said finger, and to find caution for payment of the said sum, to the said upon condition that the said should deliver to the said sufficient Letters of staynes; for demembring him of his little finger, who stand with themselves, conjunctly and severally, soverty, and cautioner fore-payd of the said three hundred Merks, to the said in full satisfaction, and assithment, of demembring him, of his middle finger, he grant and, and giving a sufficient Letter of staynes, as said is, and als decern'd all the saids their moveable goods, and geir to be escheat, and inbrought to Our Sovereign Lords use, as being convict of the said crime, whilk was pronounced for doom, and ordains Letters of Horning; upon a simple charge of ten dayes, and poynding to be directt hereupon.

Dempster our countrey-man, *hist. eccl. pag. 235.* relates this tolemnity, which is now in desuetude, *lapidem tollit magistratus signatumq; querenti tradit, ille adversarium & testes citat, si quid ambiguum, & majoris momenti, ad 12. (quos claves appellant) refertur, atq; ita sine scriptis aut impensis lites dirimi sunt solita.*

II. By the former stiles it will appear, that the debate is not insert in the Criminal Sentence, as it is in Civil Process, with us, but it contains oft-times the whole Summonds, which Decrets for Civil Causes do not. These Criminal Sentences likewise, express still the manner of the Probation; which is the *because* of the Decreet, as we speak in civil causes, and this the Doctors contend to be the custome in other Kingdoms; *inseritur enim causa in sententia, ut quod talis accusatus est de tali maleficio, & quod constat per testes vel per ejus confessionem, quod illud, maleficium commisit & ideo condemnatus est, &c. Clar. 93. num. 21.* After the Sentence is pronounced by the Judge

Judge, it is written by the Clerk, who reads to the dempster, the manner of punishment, and it is by him repeated, and the manner of punishment is called the doom, because it is pronounced by the dempster, who adds after he has pronounced the punishment, and this I give for Doom. And I find, that by the custome of *Italy*, the Clerk reads the Sentence, and the Judges adds, *ita absolvo vel ita condemno* Clar. *ibid.*

III. Albeit the Sentence bear a punishment, less then what the Statute irrogats, *eo casu*, the Sentence is not by our Law null, but the Fisk hath, by vertue of the conviction, contain'd in the Sentence, right to put in execution, or to exact what the Law appoints, though the Sentence doth not. And thus *John Wauch* in *Selkirk*, being found guilty of theft, by the Sheriff of that Shire, he was ordained to pay two thousand Merks, or to go to *Barbadoes*, in obedience to which Decreet, he payed the two thousand Merks. Notwithstanding whereof, the Exchequer gitted his liferent-elscheat to Mr. *Andrew Hedderweik*, who pursued a declaratur; in which the Lords found, that *Wauch* being once found guilty of Theft, there was *jus questum Regi*, which the Sheriff could not prejudge, by any Sentence, no more then he could remit the punishment altogether, for in so far as he did mitigate the punishment, in so far he remitted it. To which it was answered, that Theft was arbitrarily punished by our custome, sometimes by death, sometimes by tyning, according to the severall degrees of the guilt, which was punishable; and custome had in this prorogat the power of inferiour Judges. 2. If the Sheriff had done wrong, he was lyable, *ex sindi catu*, and might be punished for exceeding his power, but the party was free by his Sentence; and if the Sheriff had absolved him, though unjustly, he could not have been pursued again; so much more should the Sentence of the Sheriff, absolve from a
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greater punishment, then that which the Law appoints; *nam qui potest majus potest & minus.*

IV. Some Lawyers declare all Criminal Sentences, pronounced in the night time, to be null, but others declare, that custome hath allowed them; and though some allow inferiour Judges to proceed in the night time; but not Supream Judges, *Alber. ad l. non minorem, C. de transact.* And some allow delegat Judges to pronounce their Sentences in the night, but not ordinary Judges; because the dyets of an ordinary Judge are fixt, by the custome of his Predecessors: whereas a delegat Judge, is tyed to no time, nor place, except he be tyed to it by his Commission, *Castren. ad D. l. minorem. num 4.* Yet I would rather choose to define, that albeit regularly, a Judge ought to proceed in open day, to sentence criminals, yet he may pronounce Sentences lawfully in the night time, in these cases. 1. If the case require hast, as in mutinies, and conspiracies falls out. 2. If the crime be so abominable, that the Prince, or Judge is unwilling that the people should know that there was such a crime committed, as was done twice by the Justices, in the reign of King James the 6. by his own special recommendation, and then all the Procefs, Sentences, and Executions, was at midnight. 3. If there be just ground to suspect, that force will be used, for rescuing the Pannel. 4. Some add, that if the Judge be so busy, that he cannot proceed in the day time, he may proceed in the night time; but this seems hard, *vid. Gab. res. crimin. cas. 218.*

V. Though a formal tryal, by a Procefs, and Affize, be the regular form of tryals, yet in cases of lesser consequences, the Justices, and other criminal Judges, punish Malefactors, in lesser Crimes, *sine strepitu, & forma judicii* summarily, by ordaining them to be scourged, or banisht; instances

stances whereof, are given in the Titles of Murder, and Witchcraft; and the Justices allowed this custome in the procedure of the Magistrates of *Edinburgh*, which as it is conform to reason, so is warranted, *per. l. 2. c. 51. publico ff. de adulter. l. 2. C. de abol. l. levia ff. de accusat.* τα στυγερὰ γυνήματα καὶ ἐξ ὀπίσθεν σκοπεῖται. And though *Durhie* observes, that the Lords found, that Sheriffs, and other inferiour Judges, could not fine in Bloodwites, for above ten Pounds, without an Inquest; yet now Sheriffs fine, and imprison for all Bloodwites, and lesser delicts upon probation, led before themselves without an Inquest.

VI. Within what time a Criminal Sentence should be put to Execution, is not generally determined; and the learned *Mathews* has shewed much reading in this point, yet I might begg leave to use some liberty, being now so near the end of this Treatise; to shew what may be added, to his learned Observations, from which I have hitherto abstained, because my designe was rather to inform others, then to raise in them any esteem for me. By *l. 5. C. de custod. reor.* It is ordained, that *convictos velox pena subducatur.* But *l. 20. C. de panis*, it is said, *nolumus statim eos aut subire panam, aut excipere sententiam, sed per triginta dies super statu eorum, fors & fortuna suspensa sit.* In reconciling which Laws, *Cujac.* thinks, that generally the punishment should be presently inflicted, and that thirty dayes are only to be allowed where the Prince himself has imposed a severe sentence, which seems to be allowed by that learned Greek Scoliast *Thalalaus* *si princeps statuerit panam in aliquem non statim punitur, sed dierum triginta dilatio datur, forte enim princeps interim panam revocabit,* οὐκ ὡς γὰρ τοῦ βασιλέως ἡ τὸ τοῦ χρόνου τὴν τιμωρίαν ἀνακαλεῖσθαι.

And though *l. 19. Basil. de custod. reor. & cum fuerit convictus, non statim panam pendere, sed rursus consici in custodiam,*

stodiam iterumq; eductum audiri, nam hac dilatio iram judicum moderatiorem reddit. Yet by the word *Convictus*, there is not meant, the last Sentence; but the being so convicted, that he may be put in Irons, which was not allowed, till the prisoner be thought guilty, was by the Judge, as *Thalalus* excellently observes, *μὴδὲς εἰς ἐκτέτην τῶν ἐλγόντων πάντων δεσμεύεται.* It may be likewise observed, that the former, *l. 5.* doth not ordain that the Sentence shall be presently put to execution, but that prisoners shall be presently tried; for the words are, *de his quos tenet carcer inclusos, sancimus ut aut convictos velox pana subducat, aut liberandos custodia diuturna non maceret;* And therefore that Law proceeds, to ordain the names of the Delinquents, to be given up to the Judge, within thirty dayes. And the *Basilicks* translate this Law thus, *ne diu is qui comprehensus est, maneat in custodia oportet enim eum cito absolvi, vel puniri.*

The reason of allowing thir thirty dayes, was, because *Theodosius* having executed many Inhabitants of *Theſsalonica*, whilst he was in passion, and for raising of a slight tumult, he was so sensible of this traitly, that at St. *Ambroses* desire, he did endeavour to bridle that rage, in succeeding Princes, which he did then so abominat in himself, *Euseb. Eccles. hist. lib. 11. cap. 18.* And yet I find, that this same Law indulging thirty dayes, has been much older, as appears by *Quintilian* *declamatione de falso cadis damnato*, the words are, *& mihi videtur ideo constituta esse lex, quæ damnatum post tricesimum diem puniri voluit, quia modo videbat legumlator possi fieri: ut deciperetur accusator, modo ut calumniaretur.* And though it may be urged, that a present Execution is convenient; because that prevents the prisoners escape, by tumult, or killing himself; and that

the more speedy the Execution be, the Justice is the more remarkable, and can be the less interrupted by appeals, and intercessions; Yet certainly a Christian Magistrate, should allow sometime to the Malefactor, for setting his Soul, and House in order; lest he else by his precipitancy, destroy the Soul, with the Body, and punish the innocent Posterity, with the guilty Pannel, who gets not this time to settle his affairs: and it hath been oft found, that persons thus too hastily Execute, have been thereafter found innocent, great examples whereof, are set down by *Valer. Max. lib. 9. de temeritate*: And *Seneca de ira lib. 1.* It is likewise the interest of the Prince, that he may have time to interpose; and for this cause, *Tiberius* being offended, at the Senats too speedy Executing *Caius Lutorius*, ordered, that no man should be Execute within ten dayes after the Sentence, *Dion. in Tiber. lib. 57. vid. Sidon. Epist. 7. lib. 1.* By this delay likewise, the persons convict, have oft-times been induced to discover their Complices, and to confesse the Crimes, which others have denyed in a rage, or confusion, occasioned by the shortnesse of their respite.

With us, a Sentence may be presently put to Execution, and the Judge is confined by nothing, but by his own discretion; yet where pecuniary Mulcts are inflicted, either the Pannel is returned to Prison, till he pay his fine, or the Act of *Adjournal*, bears ordinarily, that payment should be made within six dayes, and though Barrons cannot poynd in Civil Cases, upon lesse then fifteen dayes; yet it was found that they might presently poynd, *si nec illis indicis legalibus*, upon Criminal Sentences.

VII. Sentences were execute of old, amongst the *Romans*, either by the Common Executioner, or by
Soul-

Souldiers, l. 7. *C. de Cohort.* an instance whereof, is clearly to be seen in Our Saviours Passion; and these Souldiers were called, *optiones & speculatores*, l. 6. ff. *de bon. damnat.* And yet I rather think, that the Souldiers were only Guards, and never Executioners, and were called *speculatores*, because they were appointed to oversee the Execution, and to restrain Tumults. Especially seeing common Executioners were so infamous, that they could not be advanced ever thereafter to any sacred orders, *C. clericum distinct.* 50. And I remember to have seen the Executioner of St. Johnstown, repelled by the Lords of Session, from being a witnesse.

That the Justice may force any of the Magistrats of a Town, to supplie the place of an Executioner, if they want one, is I think, without all warrand; seeing *officium nemini debet esse damnosum*: And no man would be a Magistrat, if that were allowed; but I think that the Magistrats may be fined for negligence, if they omit to appoint one; and for the same reason, I think that the Magistrat cannot force any mean person, who leads an honest life, to be an Executioner: albeit *Clar. S. Fin. quest. 99. num. 4.* And *Gomes. lib. 3. cap. ult. num. 5.* do assert, that the Judge may force any, *ex infima plebe*, to officiate in that employment; and yet their opinion agrees with our custome. The Executioner hath right to the Cloathes (*pannicularia*) of the person executed, by our custome. And *per. l. D. Hadrianus ff. de bon. dam.* But by the Civil Law, the Bodies of the persons executed, could not of old be buried, without the permission of the Prince, *ff. de cadav. punitor*, which is antiquated, *per. l. obnoxius C. de relig. & sumpt. fun.* And by our custome, wherein the persons execute, may be buried, in all cases, though the

friends of the person condemned for Treason, cannot assist on the Scaffold, or wear mourning, by our customes, except the Council give expresse consent.

VIII. If the defender be absent, then upon an Act of *Adjournal*, he is to be denounced rebel, or outlawed, (as the *English*; and our old Statutes call it) and though if the punishment be capital, or the fine be for His *Majesties* use; the Clerk of the Justice Court, can only write the Letters; yet if the fine be to be payed to any privat person, any Writer to the Signet may write the Letters; and though the 126. *Act*, 1. *Parl. Ja. 6.* appoints that all Criminal Letters should not be registrat, as other Letters, but returned to the *Adjournal*; yet *de praxi*; such Hornings are sometimes Registrat, in the ordinary Register of Horning; likeas, albeit the Escheat of him who is denounced, cannot fall upon a denunciation, at the Mercat Crosse of *Edinburgh*, though Caption may be raised upon such an Execution, yet Criminal Letters may be execute at *Edinburgh*, or any Mercat Crosse where the Justice Court did sit, in which the Sentence was pronounced, *Act* 140. *Parl. 8. K. Ja. 6.* upon production of the Registrat Horning; Letters of intercommuning are granted, upon a common Bill, past by the Lords of Session, by which all the Leidges are ditcharged to intercommune with the Rebel, which must be execute at the Mercat Crosse of the respective *Shires*, and Registrat there, or in the general Register.

Upon the denunciation immediatly the single escheat falls, and after remaining at the Horn for year and day, the life-rent escheat falls; which custom we have borrowed from *Saxonia* (with most of our other forms) for with them, *si reus fugitivus in primum sive simplex bannum sit declaratus*

neq.

net intra annum & diem se purgaverit sed annum & diem prorogare passus sit, in bannum superius incidit vid. Carpz. pract. crim. part. 3. quest. 140. num. 80. From whom also we have our stile of declaring escheats.

Upon the registrat Horning Caption is raised, and if the Messenger be deforced in the execution thereof, then the Council grants commission of fire and sword, which is But a Caption for inbringing the Malefactor, who resists the ordinary course of Law. And in my opinion, Letters of fire and sword may be granted, though the Malefactor hath not deforced, if it be notour that the Malefactor be not to be reduced in the ordinar way: for it is unreasonable to expose His Majesties Laws to contempt, and His Officers to certain hazard, as in the case where a person is denounced fugitive for deforcing Messengers, or hath convocat loose men, and lives in open rapine: it were against sense, that a new deforcement were necessar. But thir commissions are never granted but in criminal cases; and yet I remember, that one was granted to *Mackintosh*, against *Lochiel*, after that *Mackintosh* had obtained Decretes of removeing, and had raised Letters of ejection, but the Sheriff had declared that he durst not eject, for the Council thought ti not just to expose the Sheriff to certain hazard. And yet the ordinar course is, that the Sheriff should offer to eject, and if he be deforced, then the case becomes criminal; and some think that the execution of deforcement is not sufficient in that case, without a sentence ensuing on it, and that the deforcers be registrat at the Horn thereupon. But others think, that as in civil cases, Letters of second Caption are granted, where the first Caption cannot take effect; so in cases of extraordinar opposition to authority, Letters of fire and sword are granted, upon a meer execution, that the ordinar course of Law cannot take effect.

IX. It may be doubted what a Judge ought to do, if after sentence, the innocence of the person condemned, should be convincingly cleared; in which case, the answer is, that the Judge cannot rescind his own sentence, *την τιμωριαν κειρεται αςχοντι ανακαλεισθαι*, l. 56. *Basil. de pen.* but he ought to acquaint the Council, and they may interceed for his Remission, l. 27. *de pen. l. 1. §. ult. ff. de quest.* the Council may prorogat also the dyets appointed for execution; but I think the Justices, and much less inferiour Judges cannot prorogat dyets appointed for execution, even by themselves, since they are *functi*, by the pronouncing of the doom, though some ignorant Judges, *de facto*, prorogat executions, and as they cannot even before sentence remit, so neither can they prorogat for any long time, for else prorogations may be lengthened, so as to become Remissions upon the the matter. The other side of the doubt, *viz.* whether a person once absolved, may be thereafter pursued for the same crime, is more intricat, but may be somewhat cleared by these positions, 1. The same party cannot upon new probation, much less upon the old probation, accute a person once assoilzied by an Assize, though he may accuse the Assize who assoilzied him of wilful error, and that even though he should thereafter willingly confess the crime, for which he was formerly accused, though *Farin. quest. 4. num. 43.* thinks that he may be again pursued, and I should think that confession savoured too much of madness, to be the foundation of a criminal sentence. 2. Though the pursuit was at the instance of the party injured, yet His Majesties Advocat cannot again pursue upon the pretence of, *res inter alias acta*, for that were to keep people in a constant suspense. 3. If the pursuer did collude with the defender, so that the defender was assoilzied by a white Assize, in abstracting the necessary probation; I think in that case, his own fraud should not secure him, *Reg. Maj. lib. 4. cap. 28.*

si per calumniam procedat vid. cap. 2. de collus. de teg. but though the defender was affoizied by collusion, betwixt the defenders friends and the pursuer, yet I think the defender cannot again be reconveened for the same crime, since he was innocent, though the collusion was advantageous to him.

X. By the death of the offender, all punishment ceased, except in Treason, & *crimine repetundarum*, or, misemployment of publick Money, in *ceteris vero criminibus, ita demum pro delictis pena ab herede incipere potest si vivo reo accusatio mota est, l. ex iudiciorum, ff. de accus.* so that by that Law, if the pursuit was intended against the Father, it might have continued against the Son, to infer a pecunial Mulct; but this last holds not with us, amongst whom no Probation can be led in absence, except in Treason; but yet I think that a Civil pursuit, may be sustained for damage, and interest, and expences of a Criminal pursuit, even against the Malefactors Heir, as was also decided by the Senat of Savoy, *Cod. Fab. tit. de accusat. def. 15.*

F I N I S.
